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United Nations Commission on International Trade Law

Forty-first session

Summary record of the 875th meeting
Held at Headquarters, New York, on Monday, 23 June 2008, at 10 a.m.

Chairperson: Mr. Illescas ..... (Spain)

Contents

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

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08-39355 (E)

The meeting was called to order at 10.15 a.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658/Add.1-13)

Draft article 63 (Loss of the benefit of limitation of liability)

1. *Draft article 63 was approved in substance and referred to the drafting group.*

Draft article 64 (Period of time for suit)

2. *Draft article 64 was approved in substance and referred to the drafting group.*

Draft article 65 (Extension of time for suit)

3. **Mr.** Ibrahima Khalil **Diallo** (Senegal), supported by **Mr. Imorou** (Benin), **Mr. Nama** (Cameroon), **Ms. Traoré** (Observer for Burkina Faso) and **Mr. Ousseimi** (Observer for the Niger), drawing attention to the written comments on draft article 65 (A/CN.9/658/Add.1, paras. 16-18), submitted by a number of African States to express their concerns regarding the potential effects of the draft article in certain African jurisdictions, said that in order to ensure that the text was acceptable to the industry and, in particular, insurance companies, the first clause of draft article 65 reading "The period provided in article 64 shall not be subject to suspension or interruption, but" should be deleted. Draft article 65 would then read: "The person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations". Thus, while the initial two-year period for suit would remain unchanged, suspension or interruption of that period would not be formally prohibited. The draft article would then be in line with other relevant international instruments, such as the Warsaw Convention.

4. **Mr. Elsayed** (Egypt) said that, since the second part of draft article 65 contradicted the first part, the second part should be deleted. Left in its current form, the draft article might have adverse effects, since the potentially indefinite extension it provided for meant that the other party could be taken by surprise at any time and could not plan its legal action properly.

5. **Mr. Morán Bovio** (Spain) said that he favoured retaining draft article 65 in its current form because it managed to preserve the delicate balance between, on the one hand, the need for legal certainty and uniformity (by setting a two-year period for suit), and, on the other hand, the need for a degree of flexibility (by allowing for the extension of that period).

6. **Mr. Miller** (United States of America) endorsed the remarks made by the representative of Spain. If the proposal to delete the first part of the first sentence of draft article 65 was adopted, the question of suspension or interruption of the two-year period provided for in draft article 64 would be governed solely by domestic law, which varied significantly from country to country. That had been the case under the Hague-Visby Rules and had led to a lack of uniformity and predictability, particularly for shippers, and encouraged forum-shopping. His delegation had originally been in favour of a one-year period of time for suit. The decision to increase the period to two years provided much of the additional protection sought by the representative of Senegal.

7. **Mr. Mollmann** (Observer for Denmark) said that he supported the statements of the representatives of Spain and the United States. Although draft article 65, if approved, would require amendments to most States' ordinary rules on limitation of actions, including those of his own country, it would create a uniform regime at the international level. The prohibition of suspension and interruption was counter-balanced by the increase of the period of time for suit to two years from the one-year period under the Hague-Visby Rules, to which most maritime carriage was subject. His delegation had originally advocated a one-year period and thought that two years was ample time for a shipper to bring suit.

8. **Mr. Sharma** (India) recalled that the Working Group had engaged in lengthy discussions on draft article 65. In the interest of legal uniformity, he favoured retaining the text as currently drafted.

9. **Mr. Sato** (Japan) said that he sympathized with the position of the African countries. Nevertheless, since the relevant legal regime differed from country to country, it was important to take a standardized approach to the issue of time limits. As for the concerns regarding extension by declaration expressed by the representative of Egypt, he recalled that that practice was not new, having already been sanctioned by the Hague-Visby and Hamburg Rules.

10. **Mr. Sandoval** (Chile) said that it was perfectly possible to reconcile the two imperatives of legal certainty and flexibility by allowing for agreement on an extension of time for suit. His delegation would prefer to retain the current version of draft article 65.

11. **Mr. Berlingieri** (Italy) said that his delegation was in favour of retaining the current version of draft article 65. Deleting the first part of the draft article would mean that the issue of suspension or interruption of the period of time for suit would be governed solely by domestic law, a situation that would undermine the Commission's aim of achieving uniformity.

12. **Mr. Prosser** (United Kingdom), **Mr. Kim** In Hyeon (Republic of Korea), **Mr. Schelin** (Observer for Sweden) and **Ms. Talbot** (Observer for New Zealand), endorsed the remarks made by the representatives of Spain and the United States.

13. **Mr. Elsayed** (Egypt) clarified that he was not in favour of deleting the first phrase of draft article 65. However, like some other States, Egypt took the view that a time limit for requests for extension should be established.

14. **Mr. Essigone** (Gabon) said that the two-year period for suit was in line with international maritime practice. However, in its current form, draft article 65 did not grant the claimant sufficient flexibility, and for that reason his delegation supported the proposal put forward by the representative of Senegal.

15. **Mr. Moulopo** (Observer for the Congo) said that, in order to strike a better balance between the interests of the carrier and those of the claimant and to prevent any adverse effects on insurance companies, his delegation strongly supported the proposal put forward by the representative of Senegal.

16. **Mr. Mayer** (Switzerland) said that he supported retaining the current version of draft article 65 for two reasons. First, it was vital to specify a time limit for suit so that claimants did not have to revert to the relevant provisions of their national law, which differed from jurisdiction to jurisdiction and were often very complicated. Secondly, clarity and predictability were essential to ensure that lawyers for both the plaintiff and the defendant in any given case did not waste time, and thus money, unnecessarily.

17. **Mr. Hu** Zhengliang (China) said that Chinese law permitted suspension and interruption, but not extension; however, his delegation supported the text as drafted in the interests of uniformity.

18. **Mr. Honka** (Observer for Finland) said that insurers in his country found that the two-year time limit allowed enough time for settlement; he therefore supported the current text.

19. **Mr. Gombrii** (Norway) said that his delegation supported retention of the current text because the establishment of clear rules would provide invaluable clarity and legal certainty for both parties.

20. *Draft article 65 was approved in substance and referred to the drafting group.*

Draft article 66 (Action for indemnity)

21. **Ms. Shall-Homa** (Nigeria) questioned why a party being held liable should be allowed to file a counter-claim after the expiration of the period of time for suit.

22. *Draft article 66 was approved in substance and referred to the drafting group.*

Draft article 67 (Actions against the person identified as the carrier)

23. **Mr. Imorou** (Benin) proposed the deletion of the term "bareboat charterer" from the first line of draft article 67 in keeping with draft article 6, which excluded charter parties from the scope of the convention.

24. **Mr. Moulopo** (Observer for the Congo) said that since the draft convention applied only to regular liner transport, he supported the proposal by the representative of Benin.

25. **Mr. Mayer** (Switzerland) said that draft article 67 should be retained purely in the interests of shippers and claimants. It allowed a generous amount of time for the shipper to sue another party in cases where the carrier was not identified, a situation addressed in draft article 39.

26. **Mr. Imorou** (Benin) said that, as he understood it, draft article 39 addressed the problem of identifying the carrier, whereas draft article 67 assumed that the carrier had been identified.

27. **Mr. Mbiah** (Observer for Ghana) said that it was true that draft article 39 and draft article 67 were protective of shippers because they provided the

opportunity to locate the actual carrier by bringing a claim against the registered owner or the bareboat charterer; therefore, the text of draft article 67 should remain as it was.

28. *Draft article 67 was approved in substance and referred to the drafting group.*

29. **The Chairperson** said that, when considering the separate draft articles of chapter 14 (Jurisdiction), the Commission should bear in mind that draft article 76 contained an "opt-in" clause establishing that only States that made a positive declaration would be bound by the provisions of the chapter.

30. **Ms. Downing** (Australia) said that since chapter 14 contained no provision like that in draft article 77, paragraph 5, stating that any agreement contrary to that article was void, her delegation understood draft article 76 to mean that States that chose not to opt in reserved the right to regulate matters of jurisdiction according to national law. It was a fundamental issue for her delegation that Australian cargo claimants should be able to bring claims in Australia.

31. **Mr. Oyarzábal** (Observer for Argentina) said that his delegation would have preferred not to have allowed for exclusive choice of court agreements, which had been excluded in a number of MERCOSUR multimodal transport agreements. In his national jurisdiction the determination of jurisdiction or subjection to arbitration could always be made ex post facto, in other words, after the events that had given rise to the dispute.

32. **Mr. Sato** (Japan) said that, as he understood it, draft article 76 gave a free hand to the contracting State to regulate the question of jurisdiction and had his delegation's full support.

33. **Mr. Miller** (United States of America) said that his delegation supported chapter 14 as a whole; it represented a carefully balanced agreement in the Working Group. He agreed with the interpretation that States that did not opt in would retain the power under domestic law to give more or less protection to claimants. The chapters on arbitration and jurisdiction were similar in many respects, but the arbitration chapter had been drafted to harmonize with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Draft article 68 (Actions against the carrier) and definitions of "domicile" and "competent court"

34. **The Chairperson** noted that the definitions of "domicile" and "competent court" contained in draft article 1, paragraphs 28 and 29 were related to draft article 68.

35. *Draft article 68 and draft article 1, paragraphs 28 and 29, were approved in substance and referred to the drafting group.*

Draft article 69 (Choice of court agreements)

36. **Ms. Downing** (Australia), referring to her Government's written comments (A/CN.9/658, para. 63), said that in paragraph 2 (c) the meaning of "timely and adequate notice" was unclear and was likely to lead to much litigation. Her Government did not support the principle of binding a consignee or any third party unless it consented to be bound.

37. **Mr. Elsayed** (Egypt) said that he shared the concerns expressed by the representative of Australia about binding a person by an exclusive choice of court agreement when that person had not been a party to the agreement.

38. **Ms. Carlson** (United States of America) said that she agreed with the representative of Australia that any country that did not opt into chapter 14 was allowed to regulate matters of jurisdiction according to domestic law. Draft article 69 and chapter 14 as a whole were part of a carefully crafted compromise. In agreeing to the wording of paragraph 2 (c), the Working Group had decided that what constituted timely and adequate notice should be determined by domestic law. Her delegation supported the retention of the current wording of draft article 69.

39. *Draft article 69 was approved in substance and referred to the drafting group.*

Draft article 70 (Actions against the maritime performing party) and draft article 71 (No additional bases of jurisdiction)

40. *Draft articles 70 and 71 were approved in substance and referred to the drafting group.*

Draft article 72 (Arrest and provisional or protective measures)

41. **Mr. Lebedev** (Russian Federation) said that the broad wording of draft article 72, subparagraph (a), which set out the condition that the requirements of chapter 14 must be fulfilled, left room for interpretation. He took it to mean that a court that had taken provisional or protective measures was competent to consider the merits of a case if it had jurisdiction under any of the provisions of chapter 14. He would be interested to hear whether others had a different interpretation of paragraph (a).

42. **Ms. Carlson** (United States of America) and **Mr. Elsayed** (Egypt) agreed with that interpretation.

43. *Draft article 72 was approved in substance and referred to the drafting group.*

The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.

Draft article 73 (Consolidation and removal of actions) and draft article 74 (Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance)

44. *Draft articles 73 and 74 were approved in substance and referred to the drafting group.*

Draft article 75 (Recognition and enforcement)

45. **Mr. Miller** (United States of America) pointed out that the Working Group had overlooked one of the consequential changes that had become necessary after it had decided against a partial opt-in approach to the chapter on jurisdiction. He proposed that in paragraph 2 subparagraph (b) should be deleted and the chapeau and subparagraph (a) should be combined.

46. **Mr. Sharma** (India), **Mr. Sato** (Japan) and **Mr. Berlingieri** (Italy) endorsed the technical correction proposed by the representative of the United States.

47. *Draft article 75, as amended, was approved in substance and referred to the drafting group.*

Draft article 76 (Application of chapter 14)

48. **The Chairperson** took it that the Commission accepted the opt-in clause, as set out in draft article 76.

49. *Draft article 76 was approved in substance and referred to the drafting group.*

50. **The Chairperson** reminded the Commission that draft article 80 contained an opt-in clause that applied to the whole of chapter 15 on arbitration.

Draft article 77 (Arbitration agreements)

51. **Mr. Kim** In Hyeon (Republic of Korea) pointed out that "the person asserting a claim against the carrier" in draft article 77 was referred to elsewhere in the draft convention sometimes as the "claimant" (draft articles 18 and 50) and sometimes as the "plaintiff" (draft articles 68 and 70). The wording should be made consistent.

52. **Mr. Miller** (United States of America), supported by **Mr. Sato** (Japan) said that the drafting group could address the issue of consistency. He would just like to point out that the word "plaintiff" should not be used to denote "the person asserting the claim against the carrier" in chapters 14 and 15, as reference was specifically being made there to the cargo claimant, and "plaintiff" could be taken to mean any person bringing a claim, including the carrier.

53. **Ms. Czerwenka** (Germany) said that her delegation was satisfied with the draft article as currently worded.

54. *Draft article 77 was approved in substance and referred to the drafting group.*

Draft article 78 (Arbitration agreement in non-liner transportation)

55. *Draft article 78 was approved in substance and referred to the drafting group.*

Draft article 79 (Application of chapter 15)

56. **Ms. Marcovčić Kostelac** (Observer for Croatia) wondered what would happen in the event that Contracting Party opted to be bound by the provisions of chapter 15 but not of chapter 14, since the draft article bracketed the two chapters together.

57. **Mr. Miller** (United States of America) said that in some jurisdictions the provisions in chapter 14 could be interpreted as precluding all dispute resolution clauses. The aim of chapter 15 was to interfere with the arbitration system as little as possible and ensure that, if a State had opted in to the jurisdiction chapter,

parties could not evade that application of that chapter through arbitration. In the unlikely event that a State opted in to chapter 15 but not to chapter 14, the reference to chapter 14 would be meaningless and do no harm.

58. *Draft article 79 was approved in substance and referred to the drafting group.*

Draft article 80 (Application of chapter 15)

59. *Draft article 80 was approved in substance and referred to the drafting group.*

Draft article 81 (General Provisions)

60. **Ms. Czerwenka** (Germany) said that the text of her delegation's proposed amendment to draft article 81 would be circulated soon.

61. **The Chairperson** said he took it that the Commission wished to defer consideration of draft article 81 until it had the proposed amendment before it.

62. *It was so decided.*

Draft article 83 (Special rules for live animals and certain other goods)

63. **Mr. Sato** (Japan) recalled an amendment proposed by Japan in its written comments (A/CN.9/658/Add.6, para. 6) to ensure consistency between the wording of the draft article and that of draft article 63. He proposed the insertion after the words "referred to in article 19" in subparagraph (a) of the following words: "done with the intent to cause such loss or damage to the goods or the loss due to delay or".

64. **Mr. Berlingieri** (Italy), **Mr. Miller** (United States of America), **Mr. van der Ziel** (Observer for the Netherlands), **Mr. Morán Bovio** (Spain), **Mr. Kim** In Hyeon (Republic of Korea), **Mr. Sharma** (India) and **Mr. Madariaga** (Honduras) supported the proposal by Japan.

65. *Draft article 83, as amended, was approved in substance and referred to the drafting group.*

The meeting rose at 1 p.m.

United Nations A/CN.9/SR.876

General Assembly

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United Nations Commission on International Trade Law
Forty-first session

Summary record of the 876th meeting
Held at Headquarters, New York, on Monday, 23 June 2008, at 3 p.m.

Chairperson: Mr. Illescas ..... (Spain)

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Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

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08-39362 (E)

The meeting was called to order at 3.10 p.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13; A/CN.9/XLI/CRP.5)

Draft article 81 (General provisions) (*continued*)

1. **The Chairperson** invited the Commission to consider the proposed amendments to draft article 81 (A/CN.9/XLI/CRP.5) sponsored by the delegations of Germany, Austria, Switzerland and Australia.

2. **Ms. Czerwenka** (Germany), introducing the proposal, said that the draft convention established the basis of the shipper's liability to the carrier in draft article 31 but did not set a monetary cap on that liability. In order to achieve a fairer balance between shipper and carrier, the proposal's sponsors felt that the parties to a contract of carriage should have the option of agreeing to a cap on the shipper's liability. That was particularly true of strict liability, which was capped under many States' domestic law. Since the Working Group had been unable to agree on the amount of such a cap, the sponsors had felt that the draft convention should allow the issue to be addressed by agreement between the parties.

3. There had been some discussion as to whether the word "limits" in draft article 81 referred to a monetary cap on liability or to the modification of an obligation. For purposes of clarity, the proposal would replace the verb "limits" by "reduces" in paragraphs 2 (a) and (b). It would also add a new paragraph 2 (c), which would read:

> "The contract of carriage may, however, provide for an amount of limitation of the liability of the shipper, consignee, controlling party, holder or documentary shipper for a breach of obligations, provided that the claimant does not prove that the loss resulting from the breach of obligations was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result."

4. The second part of that sentence, after "provided", which reflected the language of draft article 63 (Loss of the benefit of limitation of liability), had been included in order to address the concern expressed by the representative of France, who had pointed out that even a cap that had been agreed contractually should not apply in the event of a wilful misconduct on the part of the shipper.

5. **Mr. Miller** (United States of America) said that, while he was pleased to see that the German delegation appreciated the benefits of freedom of contract, he thought that draft article 82 (Special rules for volume contracts), which the Commission had already approved in substance, offered an appropriate means of providing for limits of liability not available under the draft convention, since it was the parties to a volume contract that were most likely to agree to a cap on the shipper's liability. Moreover, the types of limits envisaged in the proposal were even broader than the shipper would be able to obtain under draft article 82, which contained super-mandatory provisions from which derogation was not possible. The proposal was therefore unacceptable to his delegation.

6. **Ms. Halde** (Canada) and **Ms. Talbot** (Observer for New Zealand) endorsed the proposal.

7. **Mr. Sato** (Japan) said that, generally speaking, his delegation welcomed flexibility regarding the shipper's liability and freedom of contract. However, he would like the sponsors to clarify whether, as the representative of the United States of America had suggested, the proposal's intent was to allow complete freedom of contract even with regard to the carriage of dangerous goods. A public policy issue was involved; draft article 82, paragraph 4, specifically stated that, even in the case of a volume contract, the derogations authorized in article 82, paragraph 1, did not apply to the rights and obligations provided in articles 30 and 33 or to liability arising from the breach thereof. If the intent at the proposal was to allow such derogations, it would call previous assumptions into question and would change his delegation's understanding of draft articles 30 and 33.

8. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that after all the unsuccessful efforts to limit the shipper's liability, it would be dangerous to allow it to be limited by contract, since the consignee's interests might not be protected. It would be preferable to leave draft article 81 in its current form and to allow the courts to determine the limits of liability in the event of a dispute.

9. **Mr. Schelin** (Observer for Sweden) said that he supported the proposal, which would benefit both parties. In particular, the option of setting a cap on liability would allow cargo insurers to cover such liability which would benefit the carrier as well. However, in light of the public policy implications of the proposal, the super-mandatory provisions of draft article 82 should be carried over to draft article 81 by including a statement to the effect that the new paragraph did not apply to the situations covered by articles 30 and 33.

10. **Ms. Downing** (Australia), speaking as a sponsor of the proposal, stressed that strict liability was usually capped under the domestic law of States; the proposal would allow the parties to agree on the cap, which, generally speaking, would be equal to the insurance value of the goods. She did not think that that option would be exercised frequently, but it should be available.

11. **Mr. Mbiah** (Observer for Ghana) said that in the interests of clarity, he welcomed the proposed changes in paragraphs 2 (a) and (b) of the draft article. However, the proposed new paragraph was a case of "too little, too late". During the negotiations, several delegations had said that they would like to set a limit on the shipper's liability. Their position had not met with the approval of the majority and the current proposal, which took the approach of contractual freedom, did not address their concerns. The draft article should remain in its current form.

12. **Ms. Czerwenka** (Germany) explained that the proposed new paragraph was intended to provide the option of capping liability, even strict liability in the case of dangerous goods. If the agreement between the parties was unfair, the matter could be referred to the courts. She did not agree with the representative of Senegal's interpretation; it seemed to her that in its current form, draft article 81, paragraph 2, did not allow for the capping of liability, even by the courts. It was true that draft article 81, paragraph 1, allowed the carrier's liability to be increased; her delegation would not object if that fact were made more explicit.

13. Draft article 82 allowed the parties to agree on greater or lesser rights, obligations and liabilities than those imposed by the draft convention. The super-mandatory provisions contained in paragraph 4 of draft article 82 were necessary because paragraphs 1 through 3 allowed for very broad derogation from the convention, but the proposed amendments to draft article 81 were narrower in scope. They did not allow the parties to change their obligations or liabilities, but merely to set a monetary cap on liability.

14. **Mr. Mollmann** (Observer for Denmark) recalled that a similar issue had arisen in the context of draft article 32. During the negotiations, his delegation had expressed the view that the draft convention should accord equal treatment to shippers and carriers; it had been opposed to allowing for the possibility of increasing the carrier's obligations under draft article 81, paragraph 1. The new proposal would increase the existing inequality by making it possible for a strong shipper to limit its own liability while increasing that of the carrier.

15. In addition, the proposal was worded in very general terms, and his concerns had not been allayed by the representative of Germany's explanation. He did not think it unrealistic to envisage a situation in which a strong shipper was able to force the carrier to accept a liability limit as low as one Special Drawing Right (SDR), allowing the shipper to escape liability entirely for all intents and purposes. As the observer for Ghana had said, during the meetings of the Working Group some delegations had tried, without success, to agree on a limit of liability for shippers. The resulting text was not his delegation's first preference, but it stood by the compromise that had been agreed.

16. **Mr. Tsantzalos** (Greece) said that he endorsed the views expressed by the representatives of Denmark and the United States of America.

17. **Mr. Bigot** (Observer for Côte d'Ivoire) said that, while his delegation would like to strike a better balance between the liability of the two parties, it was not satisfactory to do so through freedom of contract. He supported the views expressed by the representative of Senegal.

18. **Mr. Sharma** (India) said that he agreed with the proposal to replace "limits" by "reduces" in paragraphs 2 (a) and (b). As the representative of Ghana had noted, the Working Group had failed to reach agreement on a monetary cap on the shipper's liability. The compromise package agreed in January 2008 would not, therefore, be affected by a decision to allow the parties to agree on such a cap, taking into account their circumstances and the nature of their trade. The representative of Germany's explanation of the

differences between draft articles 81 and 82 was convincing, and his delegation supported the proposal.

19. **Mr. Elsayed** (Egypt) said that in light of the explanation provided by the representative of Germany, he was prepared to support the proposal, since it would ensure a fairer balance between the parties to the contract.

20. **Mr. Kim** In Hyeon (Republic of Korea) said that his delegation thought highly of the current text of draft article 81, which sought to address recent developments in shipping, such as the widespread use of containers. Since a carrier was unable to check the contents inside a closed container, without adequate information from the shipper about the nature of the contents the carrier could not transport the goods safely. In his country, in fact, there had been a number of incidents of fire and explosion due to the failure of the shipper to disclose the nature of the cargo. That was the rationale for the obligations imposed on the shipper by draft articles 32 and 33. Safe transport depended on not allowing the shipper to derogate from those obligations. Another noticeable development was the emergence of large shippers with the power to force carriers to accept absolute liability. It was highly likely that large shippers would try to exclude or limit some of their own obligations by contract; the words "excludes" and "limits" in paragraphs 2 (a) and (b) were intended to prevent that. As Denmark had pointed out, the carrier was already at a disadvantage in that the word "increases" had been omitted from the provisions in draft article 81, paragraph 1, concerning the scope of contractual derogation permitted to the carrier but was included in the parallel provisions in paragraph 2 in relation to the shipper. The implication was that the carrier's obligations and liability could be increased contractually but the shipper's could not. Although the version of draft article 81 proposed in A/CN.9/XLI/CRP.5 sounded reasonable, it in fact shifted the balance even further in favour of the shipper. His delegation preferred to retain the current text.

21. **Ms. Shall-Homa** (Nigeria) said that her delegation aligned itself with the statements of the United States of America, Denmark and Senegal and in particular those of Ghana about the Working Group's previous efforts to find a way to cap the shipper's liability. It supported the proposal to change the verb "limits" to "reduces", since the amendment was in keeping with the intent of the provision. Otherwise it wished to retain the current wording of the draft article.

22. **Mr. van der Ziel** (Observer for the Netherlands) said that his delegation could support the change from "limits" to "reduces" but had serious objections to the proposed new sentence in A/CN.9/XLI/CRP.5. As the proposal was drafted, a shipper with sufficient bargaining power could impose drastic limits on its liability; if the new provision had said, for example, that the minimum cap would be equal to the value of the goods the proposal would have been more acceptable. Moreover, some of the shipper's obligations involved a public policy issue. There were too many cases of accidents due to misinformation from the shipper about the nature of the goods; a large chemical shipper, for example, should not be allowed to contract out of liability resulting from a breach of its obligation under draft article 33.

23. **Mr. Delebecque** (France) said that his delegation could not support the proposal contained in A/CN.9/XLI/CRP.5 for the reasons stated by Japan. Provision must be made to exclude derogation with respect to the obligations under draft articles 32 and 33.

24. **Mr. Prosser** (United Kingdom) and **Mr. Berlingieri** (Italy) said that their delegations supported the retention of the current wording for the reasons stated by Denmark.

25. **Mr. Gombrii** (Norway) said that the proposal went even further than the volume contract provisions in draft article 82, which provided for certain safeguards by excluding its application to the so-called super-mandatory provisions. A powerful shipper negotiating under draft article 81 with the amendment proposed in A/CN.9/XLI/CRP.5 would be even less constrained than under draft article 82.

26. **Ms. Sobekwa** (South Africa) said that her delegation had some sympathy with the proposal but would prefer to retain draft article 81 as it stood.

27. **Mr. Honka** (Observer for Finland) said that his delegation supported the current text for the reasons given by the Netherlands and Denmark.

28. **Mr. Hron** (Czech Republic) said that his delegation supported the views expressed by the Netherlands.

29. **Mr. Moulopo** (Observer for the Congo) said that his delegation shared the views of Senegal and Côte d'Ivoire. A contract of carriage was usually a contract of adhesion, so that contractual freedom, which presupposed consent between the parties, would not provide a solution. Since the documents were usually drawn up by the carrier, the latter should not be allowed the opportunity to increase the obligations of the shipper. His delegation supported the current text.

30. **Mr. Bokana Olenkongo** (Observer for the Democratic Republic of the Congo) said that his delegation aligned itself with the statements of Denmark, the United States of America and Senegal and preferred to retain the current text.

31. **Mr. Serrano Martínez** (Colombia) said that, to be consistent with its previous position, his delegation supported the text of draft article 81 as it stood.

32. **Mr. M'inoti** (Kenya), **Mr. Sandoval** (Chile), **Mr. Essigone** (Gabon) and **Mr. Luvambano** (Observer for Angola) said that their delegations preferred to retain the current wording of draft article 81.

33. *Draft article 81 was approved in substance and referred to the drafting group.*

Draft article 78 (*continued*)

34. **Mr. Lebedev** (Russian Federation) said that, although the Commission had already approved the substance of draft article 78, there was a need for greater clarity in the drafting of paragraph 2. For example, subparagraph (a) referred to an arbitration agreement, whereas subparagraph (b) talked about an arbitration clause.

35. **Mr. Estrella Faria** (International Trade Law Division) said that at first glance there did seem to be a confusion in terms. The thrust of paragraph 2 was that the three conditions set out in subparagraphs (a), (b) and (c) were cumulative. If all those conditions were met, the arbitration agreement would not be subject to the provisions of chapter 15, which made the enforceability of the arbitration agreement dependent on certain conditions that did not normally apply to arbitration agreements in general. Perhaps the solution would be to harmonize the terms used in subparagraphs (a) and (b).

36. **Mr. Lebedev** (Russian Federation) said that the cumulative nature of the conditions was not obvious from the current wording. Perhaps some additional words of explanation would be helpful.

37. **Mr. Berlingieri** (Italy) said that chapter 15 sometimes used the term "arbitration clause", sometimes "arbitration agreement" and sometimes "arbitration clause or agreement". In some jurisdictions "arbitration clause" referred to something agreed before any dispute had arisen and "arbitration agreement" referred to something agreed after a dispute had arisen. Inconsistency in the use of terms should be avoided to prevent difficulties in interpretation.

38. **Ms. Czerwenka** (Germany) said that, if the text was referred to the drafting group, her delegation would like to see the new wording before the adoption of the draft convention as a whole, since it was hard to judge the possible implications without seeing the new text.

39. **Mr. Gombrii** (Norway) said that the provision was not a model of clarity but he could explain the practical background. Paragraph 1 provided that the arbitration provisions did not apply to charterparties, but since the draft convention could apply to bills of lading issued under charterparties, paragraph 2 then became relevant. It was very common in such bills of lading to state that the bill of lading incorporated the terms and conditions of the charterparty, and that was the situation referred to in subparagraph (a). However, it was important for a party acquiring a bill of lading to be aware that the charterparty included an arbitration agreement, hence the requirement in subparagraph (b) of a specific reference to the arbitration clause.

40. **Mr. Sekolec** (Secretary of the Commission) said that the drafting group might consider it helpful to make the use of the terms "arbitration agreement" and "arbitration clause" consistent with other Commission texts on arbitration, such as the UNCITRAL Model Law on International Commercial Arbitration. In those texts "arbitration agreement" was a generic term indicating an agreement in any form to arbitrate, whereas "arbitration clause" referred to a paragraph in a larger document. It seemed to make sense, then, to refer to an "arbitration clause" in paragraph 2 (b).

41. **Mr. Miller** (United States of America) suggested, to dispel the ambiguity pointed out by the Russian Federation, that one could simply make it clear in paragraph 2 that subparagraph (b), like subparagraph (a), referred to the charterparty clause. The appropriate

use of the terms "agreement" or "clause" could then be decided by the drafting group as it checked for linguistic consistency with other Commission texts.

42. **Mr. Hu** Zhengliang (China) proposed that paragraph 2 (b) could be eliminated, and the word "specific" could be added before the word "reference" in paragraph 2 (a). In addition, since a charterparty, a transport document or an electronic transport record could by definition contain only an arbitration clause, not an arbitration agreement, he believed that the proper reference would be to a clause, both in the chapeau of paragraph 2 and in subparagraph (a).

43. **Mr. Morán Bovio** (Spain) said that paragraph 2, which he interpreted as Norway did, was clear enough as drafted.

44. **Mr. Estrella Faria** (International Trade Law Division) suggested, after consultations and on the basis of remarks by the delegations of China and Norway, that article 78, paragraph 2, could be reformulated to read:

> "2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such an arbitration agreement:
>
> (a) Identifies the parties to and the date of the charterparty or other contract excluded from the application of this Convention by reason of the application of article 6; and
>
> (b) Incorporates by reference and specifically refers to the clause in the charterparty or other contract that contains the terms of the arbitration agreement."

The drafting group could then easily make any minor adjustments to the text.

45. *Draft article 78, as amended, was approved in substance and referred to the drafting group.*

Draft article 84 (International conventions governing the carriage of goods by other modes of transport)

46. **Ms. Czerwenka** (Germany), supported by **Mr. Delebecque** (France), said that her delegation was in general agreement with the text but proposed deleting, in the chapeau, the phrase "in force at the time this Convention enters into force" after the phrase "international conventions", so as not to limit the scope of article 84 only to international conventions in force at the time but to encompass also subsequent protocols to amend existing conventions and new conventions governing other modes of carriage. For example, an additional protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR) had recently been adopted.

47. **Mr. Schelin** (Observer for Sweden) said that additional protocols to existing conventions could be considered to be covered by the current wording. However, it would be a matter of serious concern if the proposed deletion meant that draft article 84 applied to entirely new conventions replacing the existing inland carriage conventions, for that might force some contracting States to denounce the draft convention if they wished to become parties to the new conventions. The issue would have implications for draft article 92 on reservations.

48. **Mr. Berlingieri** (Italy) said that draft article 84 should not allow the draft convention to be superseded by any new conventions adopted or any protocols that significantly extended the scope of the pre-existing conventions.

The meeting was suspended at 4.40 p.m. and resumed at 5.05 p.m.

49. **Mr. Mollmann** (Observer for Denmark) said that his delegation did not think that draft article 84 should encompass new conventions replacing existing inland unimodal conventions, for that would undermine the application of the draft convention. A reference to subsequent amendments or protocols to existing conventions would be acceptable, but would require new wording, whereas his delegation was satisfied with the current wording.

50. **Mr. Barbuk** (Belarus) proposed that the word "convention" in subparagraphs (a) to (d) should be replaced by the words "international treaty", reflecting the definition of treaty in the Vienna Convention on the Law of Treaties. That might address some of the concerns of the German delegation.

51. **Mr. van der Ziel** (Observer for the Netherlands), noting that draft article 84 was a conflict of conventions provision, said that it clearly defined the scope of application of the other conventions; as long as subsequent protocols did not extend the scope, no problem would arise. The German proposal, however,

would give a "blank cheque" to new conventions, whereas the point of draft article 84 was to protect the scope of the draft convention against future inroads from other conventions. The German proposal was undesirable not just in theory but in practice, because it was largely unnecessary. Draft article 27 applied to possible future international instruments governing inland modes of transport and addressed Germany's concerns adequately.

52. **Mr. Sato** (Japan) said that his delegation sympathized with Germany's concerns insofar as simple amendments to existing inland transport conventions were concerned, but the deletion suggested by Germany was too broad because it opened the door to entirely new unimodal conventions as well as simple amendments. However, to address Germany's point, the chapeau of draft article 84 could be amended by adding, after the words "enters into force", the phrase "including any amendment thereto". A similar phrase was used in draft article 88 (a). To be sure, that proposal would not solve the problem when an existing convention was replaced by a new convention that was in many respects a continuation of the previous convention.

53. **Ms. Carlson** (United States of America) said that her delegation opposed the Danish and Japanese proposals, since nothing would prevent a future amendment to an existing convention from completely changing the scope of that convention. She agreed with the representative of the Netherlands that it would be very dangerous to give a "blank cheque" to the drafters of amendments to existing conventions or new conventions. As he had also pointed out, future conflicts were already covered by draft article 27. The current version of draft article 84 should, therefore, be retained.

54. **Mr. Honka** (Observer for Finland) said that, as the representative of the Netherlands had pointed out, draft article 27, in its chapeau, referred to other international instruments in force "at the time of such loss, damage or event or circumstances". Any future amendments to existing inland transport conventions would, therefore, apply under draft article 27. The purpose of draft article 84 was to safeguard against possible incursions from future conventions or future amendments to existing conventions expanding their scope; the current wording should therefore be retained.

55. **Ms. Czerwenka** (Germany) said that the inclusion of the phrase "to the extent that" in subparagraphs (a) to (d) made it clear which provisions of the international conventions in question would apply; the drafters of amendments to existing conventions or new conventions would not, therefore, be given a "blank cheque", since future provisions that did not fall within the scope of the existing conventions would not apply.

56. In a spirit of compromise, she could support the Japanese proposal even if, as he himself had pointed out, it still did not cover instruments that were not amended, per se, but replaced by a complete new version. The 1999 revision of the Convention concerning International Transport by Rail (COTIF) — to which many members of the Commission were a party — was just one example of such an instrument.

57. **The Chairperson** suggested that, in view of the fairly even split in opinions, interested delegations should consult informally in order to try to reach an understanding.

58. *It was so decided.*

Draft article 85 (Global limitation of liability)

59. **Mr. Imorou** (Benin) asked why draft article 85 referred to "vessel owners" when thus far the convention had used the terms "carrier" and "shipper".

60. **Ms. Czerwenka** (Germany), supported by **Mr. Sato** (Japan), explained that draft article 85 aimed to resolve situations in which the carrier under the current convention was also the shipowner under either the Convention on Limitation of Liability for Maritime Claims or the Strasbourg Convention on the Limitation of Liability of Owners of Inland Navigation Vessels, both of which allowed the shipowner to limit his liability, for example in the case of a major accident. A carrier who was also the shipowner might be liable under the present convention to, say, up to $1 million. However, if there were other claimants against whom the shipowner could invoke a limitation of liability under the Convention on Limitation of Liability for Maritime Claims, the consignee or the shipper might receive less than the full amount and the claim would not be fully met. Her delegation believed it was important for the Conventions in question to continue to apply in the way that they currently applied. The term "vessel" had been chosen because it applied to the

carriage of goods both by sea and by inland waterways and, therefore, to both Conventions.

61. **Mr. Elsayed** (Egypt) said that it was normal for draft article 85 to refer to "vessel owners" if the vessel owner was the same person as the person mentioned in the contract of carriage. He wished to know nonetheless what was meant by the word "regulating" in the context of draft article 85. He was also concerned that any understanding reached with regard to draft article 84 might run counter to draft article 85.

62. **Mr. Berlingieri** (Italy) expressed support for the German and Japanese position, but cautioned that problems might arise if the term "vessel owners" was interpreted in the light of the Convention on Limitation of Liability for Maritime Claims, which defined "shipowner" as the owner, charterer, manager or operator of the ship.

63. **Mr. Hu** Zhengliang (China), supported by **Mr. Kim** In Hyeon (Republic of Korea), said that while he agreed that draft article 85 was necessary, he also agreed that the term "vessel owners" might give rise to misunderstandings and even disputes, particularly since the present convention did not define either "vessel" or "owner". To make the draft article clearer, he proposed changing its title to "Global limitation of liability for maritime claims", in line with the wording of the related Convention.

64. **Mr. Sharma** (India) and **Mr. Tsantzalos** (Greece) expressed support for the German and Japanese position.

65. **Mr. van der Ziel** (Observer for the Netherlands) expressed support for the current version of draft article 85. Responding to the concerns raised in respect of the term "vessel owners", he said that the word "owner" clearly referred to the Convention on Limitation of Liability for Maritime Claims and subsequent conventions, including any conventions relating to the liability of owners of inland navigation vessels; that was the most important consideration. As pointed out by the representative of Germany, the word "vessel" had been used instead of "ship" so as to cover the carriage of goods both by sea and by inland waterways; that was also relevant to draft article 27.

66. **Ms. Markovčić Kostelac** (Observer for Croatia) said that, while her delegation supported the current version of draft article 85, the inclusion of the phrase "as defined by the respective instruments" directly after the term "vessel owners" would make it absolutely clear that the draft convention referred to both the Convention on Limitation of Liability for Maritime Claims and the relevant instruments relating to inland waterways.

67. **Mr. Imorou** (Benin) said that, while he fully understood the positions of Germany and Japan, he remained concerned about possible confusion between the terms "carrier" and "vessel owners", particularly in the absence of a definition of the latter.

68. **Mr. Gombrii** (Norway) said that the proposal by Croatia would seem to solve some of the problems raised.

69. **Ms. Czerwenka** (Germany) said that, as far as her delegation was concerned, draft article 85 was adequate as it stood. The draft article simply provided that, in the event of a conflict, nothing in the draft convention would affect the application of any international convention or national law regulating the global limitation of liability of vessel owners. It was impossible to know at the current juncture whether or not such an international convention or national law would be applicable; that would depend on the instrument in question. Hence the use of the word "regulating", which also made it unnecessary to add the phrase "as defined by the respective instruments".

70. Responding to the representative of China, she said that draft article 85 related not only to maritime claims, but also to inland waterway claims, so that the current title should be left unchanged.

71. **Mr. Mbiah** (Observer for Ghana) said that, though he had initially been sympathetic to the Chinese proposal, he had been convinced by the explanation of the representative of Germany that the proposed wording would be too restrictive. The current title should, therefore, be retained.

72. **The Chairperson** said that a clear majority of delegations were in favour of retaining the current version of draft article 85.

73. *Draft article 85 was approved in substance and referred to the drafting group.*

Draft article 86 (General average)

74. **Mr. Elsayed** (Egypt) drew attention to a discrepancy between the English term "general average" and the term used in the Arabic version of

draft article 86 and said that his delegation thought that a definition of "general average" would be useful.

75. **The Chairperson** said that he noted no support for a definition, but the Secretariat would look into the matter of the Arabic wording.

76. *Draft article 86 was approved in substance and referred to the drafting group.*

The meeting rose at 6 p.m.

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Forty-first session

Summary record of the 877th meeting
Held at Headquarters, New York, on Tuesday, 24 June 2008, at 10 a.m.

Chairperson: Mr. Illescas ..... (Spain)

Contents

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

This record is subject to correction.

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Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

08-39723 (E)

The meeting was called to order at 10.20 a.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Adds.1-13; A/CN.9/XLI/CRP.3 and 6)

Draft article 87 (Passengers and luggage)

1. **Ms. Marcovčić Kostelac** (Observer for Croatia) noted that the Spanish version of the title of the draft article spoke of "Passengers and their luggage" ("Pasajeros y su equipaje"), in contrast with "Passengers and luggage" in the English version. She proposed the insertion of the possessive pronoun in the English version, in the interests of concordance and in line with the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea.

2. **The Chairperson** said that the drafting group would address the matter.

3. *Draft article 87 was approved in substance and referred to the drafting group.*

Draft article 88 (Damage caused by nuclear incident)

4. **Mr. Sato** (Japan), pointing out that the Paris Convention on Third Party Liability in the Field of Nuclear Energy had been revised in 2004, asked for the Secretariat to check the current status of all the nuclear conventions mentioned in the draft article, so as to ensure fully up-to-date references.

5. **The Chairperson** said that the Secretariat would carry out such a check and that all appropriate changes would be made.

6. *Draft article 88 was approved in substance and referred to the drafting group.*

Draft article 89 (Depositary)

7. *Draft article 89 was approved in substance and referred to the drafting group.*

Draft article 90 (Signature, ratification, acceptance, approval or accession)

8. **The Chairperson** said that the spaces between square brackets would be filled once the place and dates of signature had been agreed upon.

9. **Mr. de Boer** (Observer for the Netherlands) called attention to a letter from the Minister of Transport, Public Works and Water Management of the Netherlands, the Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority addressed to all delegations to the forty-first session of the Commission (A/CN.9/XLI/CRP.3, annex). He said that, because of the great value attached by the Netherlands authorities to the work of the Commission and in recognition of the achievement represented by the finalization of the draft convention, which would be the culmination of six years of hard work, they would consider it a great honour to organize and host in Rotterdam an event to celebrate its adoption, including a signing ceremony, if the United Nations General Assembly approved. In keeping with the maritime nature of the draft convention, a large part of the celebration would take place on an ocean passenger steamer.

10. **Ms. Carlson** (United States of America), **Mr. Morán Bovio** (Spain), **Mr. Sharma** (India), **Mr. Mollmann** (Observer for Denmark), **Mr. Honka** (Observer for Finland), **Mr. Mbiah** (Observer for Ghana), **Ms. Talbot** (Observer for New Zealand), **Mr. Berlingieri** (Italy), **Mr.** Ibrahima Khalil **Diallo** (Senegal), **Mr. Gombrii** (Norway), **Mr. Elsayed** (Egypt), **Mr. Essigone** (Gabon), **Mr. Blake-Lawson** (United Kingdom), **Mr. Sandoval** (Chile), **Ms. Downing** (Australia), **Mr. Imorou** (Benin), **Ms. Halde** (Canada), **Mr. Lebedev** (Russian Federation), **Ms. Shall-Homa** (Nigeria), **Mr. Sato** (Japan), **Mr. Luvambano** (Observer for Angola), **Ms. Traoré** (Observer for Burkina Faso), **Mr. Bokama Olenkongo** (Observer for the Democratic Republic of the Congo), **Mr. Moulopo** (Observer for the Congo), **Mr. Schelin** (Observer for Sweden), **Ms. Sobekwa** (South Africa), **Mr. M'inoti** (Kenya), **Mr. Oyarzábal** (Observer for Argentina), **Mr. Bigot** (Observer for Côte d'Ivoire) and **Ms. Marcovčić Kostelac** (Observer for Croatia) expressed deep appreciation for the leading role played by the Netherlands in the development of the draft convention and welcomed the generous offer by the authorities of that country to organize an event to celebrate its finalization and adoption. They looked forward to accepting the invitation, upon its being approved by the General Assembly.

11. **Mr. Sekolec** (Secretary of the Commission) said that Commission might wish to reflect in the text of the

draft convention itself the participants' broad recognition of Rotterdam as the most suitable place for the signing ceremony. Accordingly, the name "Rotterdam" could be inserted in draft article 90, paragraph 1, as the place at which the finalized convention would initially be open for signature. The period during which the instrument would be open to signature, first in Rotterdam and then at Headquarters, would be specified upon finalization, in late 2008 or early 2009.

12. **The Chairperson** said that it was the first time in the six years of preparing the draft convention that he had seen such a unanimous agreement to a suggestion put forward by a participant. He proposed the removal of the first set of square brackets in paragraph 1, before "at" and after "thereafter" and the insertion in the first space, in place of the dotted line and without square brackets, of the name "Rotterdam".

13. *Draft article 90, as amended, was approved in substance and referred to the drafting group.*

Draft article 91. Denunciation of other conventions

14. *Draft article 91 was approved in substance and referred to the drafting group.*

Draft article 92. Reservations

15. **The Chairman** drew attention to the proposed amendment to draft article 92 put forward by the delegations of Austria and Germany and set out in document A/CN.9/XLI/CRP.6.

16. **Ms. Czerwenka** (Germany), introducing the proposal, recalled that, throughout the negotiations, her delegation had expressed a number of concerns regarding the regulation of multimodal transport contracts as defined in the draft convention. First, the draft failed to address various specific problems relating to carriage performed partially by land, inland waterway or air. The list of exemptions in draft article 18, paragraph 3, had been drawn up with only maritime transport in mind. For instance, it was inconsistent to relieve the carrier of liability in cases of fire on the ship in draft article 18, paragraph 1 (f) but not in cases of fire affecting other vehicles. Furthermore, draft article 82 on volume contracts in conjunction with the definition of "volume contract" did not address situations in which the contract of carriage provided for a series of shipments by road but only a single shipment by sea.

17. Second, there was no justification for applying the maritime regime set out in the draft convention in cases where the land leg was considerably longer than the maritime leg. In particular, it was difficult to understand why, when compared with the provisions of other instruments, including the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM-COTIF), the draft convention provided for significantly diminished carrier liability in such cases.

18. Third, when determining the applicability of draft article 27, the text placed an unfair burden of proof on the shipper, who would usually be unable to prove where the damage had occurred and would thus be unable to rely on draft article 27 for the purposes of compensation.

19. Fourth, the draft convention discriminated against the shipper as compared to the carrier in cases where another international convention provided for a shorter period of time for suit. If, pursuant to draft article 64, the shipper instituted a claim more than one year after the breach of obligation but before the expiry of the two-year period provided for in that article, such a claim could be dismissed if the carrier was able to prove, for example, that the damage had occurred during the land leg covered by the provisions of CMR, since, pursuant to the latter, the period of time for suit was only one year.

20. Fifth, the absence of a rule allowing the claimant to take direct action against the carrier performing carriage by road or rail was problematic. It was even more problematic to leave unresolved the issue of whether, by virtue of draft article 12, paragraph 3, the carrier could restrict the period of responsibility to the tackle-to-tackle period and thus, on the basis of draft article 20, paragraph 1, exempt itself and the maritime performing party from any liability for damages occurring on land.

21. Sixth, there was no justification for not allowing parties to a maritime plus contract to opt out of the network system provided for in draft article 27 and to agree on the application of a single liability regime.

22. Seventh, the draft convention led to a fragmentation of the laws on multimodal transport contracts because it applied only to one part of those contracts. In her view, it was unreasonable to exclude, by virtue of draft article 84, any modernization of

unimodal conventions and, in addition, to prevent the adoption of an international regime regulating not only maritime plus contracts but also full-fledged multimodal transport contracts.

23. Since the Commission had already approved most of the draft text, it was no longer possible to remedy the aforementioned shortcomings. Thus, the German and Austrian delegations had proposed redrafting the reservations clause in such a way as to allow contracting States to reserve the right not to apply the convention to maritime plus contracts. States that shared her delegation's concerns would thus be in a position to ratify the convention and introduce a new maritime regime. In the absence of a reservations clause, States with concerns about the multimodal regulations might not ratify the instrument. Furthermore, the reservations clause was discretionary, not mandatory, and did not preclude the possibility of adopting a comprehensive set of uniform rules on genuine multimodal transport contracts at the international level.

24. **Mr. Barbuk** (Belarus) expressed support for the statement by the representative of Germany. While the draft convention dealt primarily with carriage by sea, some States were completely landlocked. The proposed new version of draft article 92 would ensure that the instrument was of interest to those States.

25. **Ms. Carlson** (United States of America) said that her delegation was strongly opposed to the proposal put forward by Austria and Germany. Indeed, should that proposal be approved, the United States would have very little interest in becoming a party to the convention. The door-to-door (or maritime plus) scope of the instrument was essential. Specifically excluding the application of the convention to contracts providing for carriage by sea and by other modes of transport in addition to sea carriage would undermine its fundamental purpose. Furthermore, acceptance of the maritime plus nature of the convention was an integral part of the compromise package agreed upon by over 30 States at the twenty-first session of Working Group III (Transport Law) (A/CN.9/WG.III/XXI/CRP.5). Her delegation could not approve the proposal put forward by Austria and Germany without violating that agreement.

26. **Mr. Mollmann** (Observer for Denmark) said that, like the representative of the United States, he was neither willing nor able to support the Austrian and German proposal. The Commission had devoted six years to developing a set of binding rules that responded to modern transport needs and established a uniform and predictable regime at the global level. The proposed amendment would drastically alter the scope of those rules by allowing contracting States to restrict their application to port-to-port contracts. National law would thus govern the land legs of any multimodal transport contracts, a situation that undermined the Commission's desire for uniformity. In addition, the proposed new wording of draft article 92 ran counter to the compromise solution reached in the Working Group.

27. **Mr. Morán Bovio** (Spain) stressed that there was a need for consistency in the Commission's decisions. The representative of Germany had enumerated a number of flaws in the draft convention, but her comments reflected only her delegation's perspective, not the perspective of the Commission as a whole. The Working Group had been mandated to draft a legislative instrument covering multimodal transport. The proposal put forward by Austria and Germany undermined that mandate and, if approved, would divest the draft convention of its door-to-door scope and run counter to the work done so far. His delegation therefore favoured retaining the current text of draft article 92.

28. **Mr. Lebedev** (Russian Federation) said that he welcomed the opportunity to revisit the issue of the scope of the draft convention and trusted that the points raised by the representative of Germany would be reflected in the record of the meeting and taken into consideration in the context of any future discussions on the question of reservations. With a view to determining the consequences of the amendment to draft article 92 proposed by Austria and Germany, he recalled that, upon ratifying the convention, States would automatically denounce the Hague-Visby and Hamburg Rules. However, if contracting States then reserved the right to exclude the application of the convention to maritime plus contracts, it appeared that situations in which goods were lost during the maritime leg of a multimodal transport contract would remain unregulated by international law. He would be grateful for further clarification in that regard.

29. **Mr. Blake-Lawson** (United Kingdom) said that the proposal of Austria and Germany would be costly in terms of uniformity; he urged delegations wishing to introduce the possibility of reservations to the

convention to be willing to compromise on other draft articles. The draft convention was perhaps too detailed, but useful ambiguities in the text permitted a certain flexibility in its application. Draft article 2 on interpretation of the convention required States to be faithful to its spirit, but allowed ample scope for domestic law or judicial determination to fill in any gaps or ambiguities. Though the possibility of reservations might make it more palatable to his delegation in view of its concerns about chapters 9 and 12, but it regarded, the text as drafted as very workable. Certainly, no reservation should be permitted that would compromise the delicate balance between cargo and carrier interests reflected in the text. Delegations should have faith in the work they had done on the draft convention and stand by what had been agreed previously; he urged the retention of draft article 92.

30. **Mr. Tsantzalos** (Greece) said that he did not support the proposal by Austria and Germany. Shipping was a national commercial activity that required international rules, and the best way to get results was through an international convention. A reservation clause opened the door to regulatory arrangements that would lead towards a fragmented system and away from uniformity and clarity. After six years of work, that proposal undermined the purpose of the draft convention.

31. **Ms. Halde** (Canada) said that her delegation supported the proposal, which was a final attempt at introducing needed flexibility into the text, leading to a higher number of ratifications.

32. **Mr. Schelin** (Observer for Sweden) said that he was worried that some of the major trading countries had raised concerns regarding multimodal transport and limitation levels. Uniformity was indeed important, but it would not have much value if only a few States were able to ratify the convention. In the worst-case scenario, the convention might enter into force alongside the Hague-Visby and Hamburg Rules, resulting in three or even four systems being applied simultaneously. He urged a compromise in order to broaden the consensus.

33. **Ms. Downing** (Australia) said that she agreed with the United States delegation that door-to-door scope was important, but that aim had not been achieved. Her delegation, too, had hoped for uniformity in the system, which the current instrument did not provide. It had already shared a number of its concerns, especially regarding draft article 27 and draft article 12, paragraph 3, and thus supported the proposal by Austria and Germany.

34. **Mr. Maradiaga** (Honduras) said that the draft convention was in line with the purpose of the Commission, which was the harmonization of international trade law. Allowing reservations would undermine the work done by the Working Group; his delegation therefore did not support the proposal.

35. **Mr. Delebecque** (France) said that the proposal would allow States to set aside the convention, even for the maritime segment, if it had a multimodal component. The proposal could cover any liner transport, and in his view it went too far. There might be a need to consider a multimodal transport regime in a regional context, but the proposal as drafted contained a high risk of fragmentation of law.

36. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that his delegation had been sceptical about the draft convention, but found that draft article 92 in its current form was fully acceptable. It represented a compromise and ensured that the convention would be broad in scope.

The meeting was suspended at 11.50 a.m. and resumed at 12.10 p.m.

37. **Mr. van der Ziel** (Observer for the Netherlands) said that, in the view of his delegation, the proposal on reservations in respect of maritime plus contracts went too far. In general, modern contracts, particularly in the container trade, were multimodal; regulating port-to-port contracts no longer made sense. Some concessions had been made: for example, a distinction had been drawn between maritime performing parties and inland performing parties without providing for direct action against an inland performing party. He agreed with the observer for Sweden that it would be important to enable the major trading countries to adhere to the convention, but excluding the whole multimodal aspect through a reservation clause went too far.

38. **Mr. Sato** (Japan) said that he was sympathetic to the need for adjustment regarding multimodal transport, but the proposal went too far by excluding multimodal transport as a whole without any conditions. States could refuse to apply the convention regardless of whether any other regimes applied. The proposal represented extreme pre-emption of rights,

which his delegation could not support. It was not opposed to some adjustment, but hoped for a more limited and reasonable approach.

39. **Mr. Berlingieri** (Italy) said that, from the outset his delegation had advocated for a modern door-to-door instrument that would be more suited to the age of container shipping. To allow the proposed reservations would undermine uniformity. His delegation was never opposed to negotiation, but after six years, it was time to come to a conclusion and adopt the current text of draft article 92.

40. **Mr. Sandoval** (Chile) said that his delegation rejected the proposal and favoured the current text of the draft article.

41. **Mr. Gombrii** (Norway) said that his delegation could not agree to the proposal for both substantive and procedural reasons, having joined the compromise in the Working Group. He agreed with the representative of Sweden that it was a problem when major trading nations felt that they could not sign the convention, but perhaps that was an indication that compromise was needed on limitation of liability. For example, the limits under draft article 61 could be maintained, but with a phase-in period, which might then allow States to ratify the Convention.

42. **Mr. Orfanos** (Observer for Cyprus) said that his delegation did not support the proposal for the reasons stated by the delegations of Greece, the United States, Spain and Denmark.

43. **Ms. Czerwenka** (Germany) argued that it was common for delegations to make provision for reservations to a convention at the end of negotiations, in order to address their concerns with some part of the instrument. Other conventions, such as the United Nations Convention on Contracts for the International Sale of Goods, allowed for rather broad reservations. The reservation clause proposed by the African States in their written comments (A/CN.9/658/Add.1, para. 24) was not framed in terms of contracts. In contrast, the Austrian and German proposal did refer to one of the two specific types of contracts, as described in draft article 1, paragraph 1, that were regulated by the convention. The proposed reservation clause would only apply to multimodal contracts; States that had ratified the convention would still be required to apply it to contracts that provided for carriage by sea only.

44. Currently, if a multimodal transport contract included a maritime leg, it might still be necessary under the applicable law to apply the Hague Rules, for instance to the maritime leg. If a State ratified the convention and denounced the Hague Rules, it would then apply the maritime regime provided for in the convention to the maritime leg of a multimodal contract. In that regard, the current situation would not change.

45. Although it was not possible under the draft convention, it should be possible — and would indeed be advantageous — for parties to be able to apply a single, uniform liability regime to multimodal transport contracts, without having to prove where damage to the goods had occurred; the burden of proof might be difficult and costly for the shipper.

46. **Mr. Honka** (Observer for Finland) said that his delegation had framework instructions from his Government, which had welcomed the Commission's efforts to deal with multimodal aspects. However, draft article 27 in its current form was too uncompromising, because it did not provide for the possibility of applying national mandatory law. Since his delegation was not completely happy with draft article 27, which had already been approved, it would like to allow States some room for manoeuvre, which might lead to broader ratification of the convention. His delegation thought that further compromise remained possible and would be prepared to discuss the reservation clause proposed by the delegations of Austria and Germany, though its scope would have to be restricted.

47. **Ms. Shall-Homa** (Nigeria) said that her delegation had some sympathy for the Austrian and German proposal. By concentrating on agreed basic rules and allowing disagreement on certain other matters, a reservation clause provided a means of encouraging harmony among States with widely differing social, economic and political systems. However, such a clause should not call into question the integrity of the draft convention, which had been the product of significant efforts and compromises.

48. Her delegation had had serious reservations on several articles, most notably draft article 14. It had hoped that draft article 14 would be based on the principle of due diligence, both before the voyage and throughout it to the point of final delivery, in the light of the obligations placed on shipowners, as a result of the International Safety Management (ISM) code and

other laws affecting shipping. It had also hoped that draft article 14 would eliminate the defence based on nautical fault, or exceptions for acts, neglect or default in navigation or management of ships, frequently invoked by carriers. Draft article 14, paragraph 2, also permitted contractual allocation of responsibility for certain functions, such as loading, handling, stowing and discharging, to the shipper and the consignee. Given the lack of sophisticated discharge and loading equipment in the African trade, it was clear that allowing carriers to contract out of responsibilities for certain functions created a complex set of liabilities in a localized manner, and would not lead to the uniformity and harmonization that the convention sought to achieve. Nevertheless, she remained hopeful that a compromise might be reached.

49. **Mr. Serrano Martínez** (Colombia) said that the proposed reservation clause would sacrifice the scope of contractual freedom embodied in the draft convention and undermine uniformity by introducing substantial changes. Draft article 92 was the product of intense debate in the Working Group; the time had come to move forward. His delegation therefore supported the retention of article 92 in its current form.

50. **Ms. Talbot** (Observer for New Zealand) said that her delegation, along with a probable majority of delegations in attendance at the current session, had not been a party to the compromise that had been reached at the twenty-first session of the Working Group. It shared the concerns that had been voiced regarding the draft convention and had sympathy with the suggestion made by the representative of Sweden that a compromise should be reached. The prospect of three parallel legal regimes — the Hague-Visby Rules, the Hamburg Rules and the current convention — operating concurrently, to the detriment of the Commission's goal of uniformity, was also a matter of concern. Her delegation had entered the negotiation process seeking uniform rules for international transport door-to-door, and like the delegation of Australia, she considered that that goal had not been satisfactorily achieved. Although the proposed reservation clause did not resolve the problem for her delegation, she remained open to seeking a different solution to the outstanding problems.

51. **Mr. Elsayed** (Egypt) said that the door should not be opened to reservations. His delegation supported further compromise with the aim of improving upon the draft convention; that, in turn, would address the concerns raised by the delegations of Austria and Germany and at the same time make it possible to implement the convention, which had been the product of extensive efforts. The delegation of Germany had indeed raised an issue of particular relevance, given the rise in multimodal transport and its impact on maritime transport.

52. **Mr. Sharma** (India) said that the proposed reservation clause was clearly related to the scope of application of the draft convention. Early in the negotiations, the character of the draft convention — whether it should be multimodal, door-to-door or restricted to the sea voyage — had been the subject of debate. The final decision had resulted in a door-to-door, maritime plus convention that was not truly multimodal in character. The reservation clause provided for opting out of the convention as a whole with regard to multimodal contracts and therefore changed the maritime plus character of the instrument.

53. Another issue highlighted by the delegation of Germany was the applicability of the regime to the land leg of the transport contract. The problem had been solved to a great extent, with regard to the application of international instruments, where applicable, when such instruments were available in regional forms such as CMR. Since the beginning of negotiations his delegation and several others had been pointing out that there was a gap for non-CMR countries. The proposal also addressed that issue indirectly.

54. He agreed with most delegations that, following extensive discussions, a delicate balance had already been reached on draft article 27. However, as minor problems remained, his delegation was open to further discussion of a solution, including a reservation clause, but opposed reservations to the convention as a whole.

55. **Ms. Sobekwa** (South Africa) said that her delegation could not support the proposal made by the representatives of Austria and Germany because it would severely undermine the convention or destroy its value as a means of promoting uniformity. The current text of draft article 92 should be retained.

56. **Mr. Mbiah** (Observer for Ghana) said that his delegation also associated itself with the comments of the observer for Sweden regarding the importance of producing a convention that could be implemented. The draft convention's key elements of uniformity, modernization and balance of interests had been

maintained, despite the delicate compromises made, and had in fact served as the basis for those compromises. At some of the Working Group's deliberations, the choice of a uniform liability approach versus a network liability approach had been debated extensively. While a uniform approach had been favoured, the impossibility of achieving it had led to the adoption of a mixed approach, built upon a whole series of decisions taken over a long period of time.

57. Although his delegation, like others, had problems with certain draft articles, it should be borne in mind that parties to a compromise never left the negotiating table entirely satisfied, but that all involved hopefully gained something in the process. The Commission had come to accept the maritime plus regime with all its limitations, and after six years of negotiations, it was too late to seek further compromises, which would undoubtedly require another lengthy process. Draft article 92 in its current form was important; if parties were allowed to make selective use of the provisions of the convention, that would undermine the basis of the instrument and be inconsistent with its very title.

58. **Ms. Markovčić Kostelac** (Observer for Croatia) said that although it was true that reservation clauses were usually negotiated in the later stages of the finalization of a convention, the adoption of the proposal made by the delegations of Austria and Germany, at such a late stage in the process, would constitute a radical approach. Many compromises had been made during nearly six years of negotiation. No one involved was likely to be entirely satisfied with the compromises reached, but all could agree that some of their views and approaches had been taken into account. Both the carriage and shipping industries in her country were modest ones, and for that reason, her Government was keenly interested in having international rules. Accepting the proposed amendments to draft article 92 would result in an international instrument that had been ratified by many countries but was implemented on a very limited scale, and that, in turn, would not lead to the harmonization to which the Commission aspired. However, her delegation remained open to further discussion and possible compromises, provided that they did not deviate from the main principles of the draft convention.

59. **Mr. Hu** Zhengliang (China) welcomed the proposal made by the delegation of Sweden and said that compromise was necessary in order to achieve real legal uniformity.

60. **Mr. Bigot** (Observer for Côte d'Ivoire) said that his delegation supported the retention of draft article 92 in its current form for the reasons cited by the United States delegation and others, and in the light of the compromise achieved in the Working Group. Further compromise on draft article 92 would jeopardize the delicate balance achieved on a number of provisions in the draft convention.

The meeting rose at 1 p.m.

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Summary record of the 878th meeting
Held at Headquarters, New York, on Tuesday, 24 June 2008, at 3 p.m.

Chairperson: Mr. Illescas ..... (Spain)

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Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

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08-39735 (E)

The meeting was called to order at 3.10 p.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13; A/CN.9/XLI/CRP.6)

Draft article 92 (Reservations)(continued)

1. **The Chairperson** invited the Commission to resume consideration of the Austrian and German delegations' proposal to replace the text of draft article 92 with two new paragraphs that would allow States to exclude application of the draft convention to contracts that provided for carriage by sea and by other modes of transport in addition to sea carriage (A/CN.9/XLI/CRP.6).

2. **Mr. von Ziegler** (Switzerland) said he realized that the purpose of the proposal was to allow as many States as possible to adhere to the draft convention, thereby replacing the proliferation of competing instruments with a single instrument that reflected the needs of the trade. However, the proposal would simply lead to another proliferation — that of reservations — which would do nothing to harmonize law. Some delegations had maintained that the freedom of contract allowed under some provisions of the draft convention would also pose an obstacle to harmonization. However, the 1980 United Nations Convention on Contracts for the International Sale of Goods, which provided for similar freedom of contract, had not had that effect. If some contracting States opted for the reservation, he could foresee major problems in determining whether the convention applied to a given contract of carriage, depending on where the forum was and whether the place of receipt and the place of delivery were in different States.

3. **Mr. Nguema Assoumou** (Gabon) said that he associated himself with the representatives of Senegal, Côte d'Ivoire and other States that had stressed the need to work towards the harmonization of national legal systems. The Commission should adopt the solution that would be acceptable to the greatest number of delegations, but his delegation could not support the proposal.

4. **Mr. M'inoti** (Kenya) said that his delegation, like many others, was satisfied with some provisions of the draft convention and had concerns about others. However, the proposal would not solve that problem, and it would be preferable to leave draft article 92 unchanged.

5. **Mr. Beare** (Observer for the Comité Maritime International) said he was aware that the proposal raised policy issues that should be decided by Governments. However, he wished to place his organization's position on record. For the past seven years, the Comité Maritime International, which represented national maritime associations throughout the world, had taken the consistent view that in order to modernize maritime law and facilitate current commercial practice, the draft convention should cover door-to-door transport. It had taken that position during the preparation of the preliminary draft of the convention, which had subsequently been revised and considerably improved by the Working Group. The proposed amendment to draft article 92 would not promote harmonization and would lead to uncertainty, particularly regarding the mandatory scope of the convention with regard to contracts such as those currently concluded on well-known trade forms such as COMBICON and MULTIDOC.

6. **Ms. Mbeng** (Cameroon) said that some of the sponsors' views coincided with those expressed in document A/CN.9/658/Add.1, which contained the comments of a number of African States. Her delegation had initially considered that making the draft convention applicable to door-to-door operations would have serious legal consequences for many countries of her region, among other things by placing a heavier burden of proof on the claimant in most cases, and that small-scale operators, especially transport intermediaries, would be forced out of existence by the major operators. However, after hearing the speakers who had argued for the need for a global harmonized instrument, she had come to believe that the draft article should remain in its current form.

7. **Ms. Flores** (Venezuela) said that her delegation, too, would prefer to leave draft article 92 unchanged.

8. **Mr. Schelin** (Observer for Sweden) said that, at the previous meeting, he had sensed that many delegations might be willing to compromise on the issues of limits of liability and multimodal transport. He would therefore like to make a last attempt to broaden the consensus on those matters by proposing a new draft article 92 bis (Special declarations) which would read:

"A State may according to article 93 declare that:

(a) it will apply the Convention only to maritime carriage; or

(b) it will, for a period of time not exceeding 10 years after entry into force of this Convention, substitute the amounts of limitation of liability set out in article 61, paragraph 1, by the amounts set out in article 6, paragraph 1(a), of the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978. Such a declaration must include both amounts."

9. That proposal should be considered as a package since it covered both the issues that he had mentioned. Unlike the proposal made by the delegations of Austria and Germany, it would allow States to stipulate that the draft convention would apply only to the port-to-port (maritime) carriage portion of multimodal operations that also included land transport, an option available also under the Hague, Hague-Visby and Hamburg Rules. It might be argued that such an approach would be detrimental to uniformity, but it would trigger ratification by a number of States that had stated that they were not in favour of a multimodal convention and would thus increase the chances of arriving at uniform rules, at least for the maritime portion of the transport. If the current text remained unchanged, there was a risk that many States would refuse to ratify the draft convention. The result would be a situation in which there would be not three, as at present, but four sets of rules with no uniformity even for the maritime leg of the operation.

10. He believed that if States had the option of making a special declaration upon ratification of the instrument, many of them might not make use of it. But if that option was not available, strong shipping interests in those States might well prevent ratification. The proposal was also an attempt to reassure delegations that were in favour of setting high limits of liability since those levels would, in fact, be reached no later than 10 years after the entry into force of the draft convention. It should be borne in mind that if the convention was not ratified by the States that wanted to set lower limits, the Hague-Visby Rules, which set a limit far lower than that of the Hamburg Rules, would become the dominant system in practice.

11. His delegation's proposal also had the merit of leaving the compromise reached in the Working Group untouched since the draft convention would still cover door-to-door transport and would leave the limits established in draft article 61 unchanged, subject to a transitional period and to the option not to apply them to multimodal transport.

12. **Ms. Carlson** (United States of America) said that she was grateful for the Swedish delegation's attempt to find a compromise solution. She agreed that the Commission's goal was to achieve the broadest possible ratification of the draft convention; however, she had more faith in the draft convention than the representative of Sweden did and was convinced that the best way to achieve broad ratification was to honour the compromise reached over the course of six years of negotiations. It was somewhat disingenuous to say that the new article would not affect the compromise package agreed in the Working Group (A/CN.9/WG.III/XXI/CRP.5) since multimodal transport and the agreed limits of liability were essential elements of that package. The proposal would not promote wider ratification and would undermine uniformity by allowing States to limit the convention's applicability to maritime carriage.

13. From the procedural point of view, she did not think that the Swedish proposal should be discussed until the Commission had taken a decision on the proposal submitted by the delegations of Austria and Germany.

14. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said he agreed with the representative of the United States of America that the compromise package would be undermined by either of the two proposals; it appeared that the great majority of delegations were in favour of leaving draft article 92 unchanged.

15. **Mr. Mbiah** (Observer for Ghana) said that he appreciated the Swedish delegation's effort to find a compromise acceptable to all. However, he could not support such a "back-door" approach, which would introduce new elements at a late stage of the negotiations and revise limits that had already been agreed. The proposal would create general uncertainty as to the state of the law on matters covered by the draft convention; as he had stated at the previous meeting, it was important not to create a situation in which States could select only the elements of the convention that suited them. Furthermore, the proposed 10-year transition period was an arbitrary one for which no justification had been presented. Lastly, the

explanation provided by the representative of Sweden should have been submitted in writing, together with the proposal, as a conference room paper so that delegations could consider the consequences of the proposed new draft article.

16. **Mr. Morán Bovio** (Spain) said that his delegation would prefer not to introduce the special declarations envisaged in the Swedish proposal. Past experience had shown that many factors influenced States' ratification of an international instrument; time would show whether it would achieve broad acceptance.

17. **Mr. Berlingieri** (Italy) said that, while he appreciated the Swedish delegation's efforts, like previous speakers he rejected the proposal. Speaking on a point of order, he said that the Commission should finish discussing draft article 92 before it discussed the proposed draft article 92 bis.

18. **The Chairperson** agreed that, in order to avoid confusion, the Commission should finish its discussion of draft article 92 and the Austrian and German proposal contained in A/CN.9/XLI/CRP.6 before discussing the Swedish proposal. He invited any delegations still wishing to speak on draft article 92 to do so.

19. **Ms. Czerwenka** (Germany), supported by **Mr. Hu** Zhengliang (China), said that the issue under discussion was extremely important. Every effort should therefore be made to ensure that those major trading partners represented at the meeting could tell their respective Governments that the convention reflected an appropriate compromise and should be ratified.

20. During the discussion of the Austrian and German proposal (A/CN.9/XLI/CRP.6), a number of delegations had expressed their willingness to work towards a compromise. That meant looking for alternatives, not rejecting a text simply on the basis of a vote count. If the Commission wished to reach a compromise, it should consider all the proposals put forward thus far.

21. In that regard, she expressed appreciation to the Swedish delegation for trying to come up with a new proposal to address the various concerns. The Swedish proposal did at least contain one element, if not all elements, of the Austrian and German proposal. In a spirit of compromise, her delegation was more than willing to continue searching for a compromise acceptable to all delegations, whether in the plenary meeting or in informal consultations.

22. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that the reference to trading partners was inappropriate. Some delegations were in favour of the draft article and some were not; it was as simple as that. He urged the Chairperson to close the discussion on draft article 92 so that the Commission could move forward.

23. **The Chairperson** noted that, while a considerable number of delegations were in favour of replacing the current version of draft article 92 with the text contained in A/CN.9/XLI/CRP.6, an even larger number of delegations were in favour of leaving draft article 92 unchanged. In line with usual practice, the current version of draft article 92 should therefore be retained.

24. *Draft article 92 was approved in substance and referred to the drafting group.*

25. **The Chairperson** invited further comments on the draft article 92 bis proposed by the representative of Sweden.

26. **Ms. Halde** (Canada) said that her delegation welcomed the Swedish delegation's proposal and sympathized with its efforts to unify the law and reach out to States that would otherwise be unable to ratify the convention.

27. **Mr. Delebecque** (France) and **Mr. Tsantzalos** (Greece) expressed support for the position of the United States and Senegal.

28. **Mr. Bigot** (Observer for Côte d'Ivoire) said that the Swedish proposal, if adopted, would result in an even more fragile compromise. He could not therefore support the proposal, for the reasons mentioned by the United States and Senegal.

29. **Mr. Serrano Martinez** (Colombia) said that, in view of the overwhelming support for and recent approval of draft article 92, the Swedish proposal was no longer valid.

30. **Mr. Sandoval** (Chile) said that the Swedish proposal was unacceptable in terms of both form and content.

31. **Mr. Maradiaga** (Honduras) said that his delegation questioned whether the rules of procedure allowed for a whole new article to be added to the draft

convention, as in the Swedish proposal, and could not, therefore, support the proposal.

32. **Mr. van der Ziel** (Observer for the Netherlands) said that the Swedish proposal was a very innovative idea and a perfect example of a compromise that accommodated States with strong views on the subject while minimizing the impact on others. In principle, his delegation would favour such a compromise. He would, however, like to see the proposal in writing first, so as to be able to consider it properly.

33. At first sight, for example, subparagraph (a) of the Swedish proposal seemed to repeat paragraph 1 of the Austrian and German proposal; with further consideration, however, it might be possible to find less far-reaching wording that still accommodated the concerns of those States in favour of the proposal.

34. As to subparagraph (b) of the Swedish proposal, he failed to see how it would affect decisions relating to draft article 61. If he had understood the proposal correctly, it would simply enable those States that objected to the amounts of limitation of liability set out in article 61, paragraph 1, to ratify the convention earlier than they would have done otherwise.

35. **Ms. Sobekwa** (South Africa) proposed that interested delegations should meet informally in order to draft a new compromise version of draft article 92 bis. The situation would be resolved only if the Commission found a compromise that was acceptable to all delegations.

36. **The Chairperson** reiterated that issues relating to legislative policy should be decided in the plenary meeting.

37. **Ms. Shall-Homa** (Nigeria) said that the Commission was opening a Pandora's box. Many delegations could point to issues that had not been resolved as they had hoped; if the proposed draft article 92 bis was discussed any further, any number of other "special declarations" might be proposed. Her delegation agreed with previous speakers that the matter should be closed.

38. **Ms. Downing** (Australia) said that, while she appreciated the Swedish delegation's efforts, she agreed with the United States and Senegal that the Swedish proposal undercut the compromise reached in the Working Group. That compromise, while not binding on the Commission, had been agreed as a package. If any of the elements of that package were changed, all other elements should then be up for discussion.

39. **Mr. Orfanos** (Observer for Cyprus) said that his delegation could not support the Swedish proposal.

40. **Ms. Markovčić Kostelac** (Observer for Croatia) said that she was unable to discuss the proposal until she had seen it in writing.

41. **Mr. von Ziegler** (Switzerland) said that the Swedish proposal was not a compromise in the true sense; rather, it reflected the fact that sometimes compromises were not possible, since it introduced the possibility of deviations from certain provisions of the draft convention. The provision allowing a State to substitute the amounts of limitation of liability set out in article 61, paragraph 1, by other amounts was very creative but if States were allowed to make special declarations, it would be difficult to know exactly which amounts applied at any given time. Furthermore, it was not clear what would happen at the end of the 10-year period. The insertion of a new chapter to clarify the procedure to be followed, while one possibility, was not worthwhile in his view.

42. Many compromises had been made on key issues, including on limitation of liability. Those compromises should be respected. The door-to-door aspect of the draft convention had been decided at an early stage. To conclude, the Swedish proposal did not have his delegation's support and need not be issued in writing. To postpone a decision would not be helpful, for the reasons explained by the representative of Nigeria.

43. **Mr. Mollmann** (Observer for Denmark) said he thought that a decision could be taken without waiting for a written text. His delegation understood Sweden's proposal for a draft article 92 bis but could not support it. With regard to subparagraph (a) of the proposal, although phrased somewhat differently it was similar enough to the proposal of Austria and Germany contained in A/CN.9/XLI/CRP.6 that the comments already made by delegations in that regard were applicable. The second part of the proposal was innovative, but his delegation could not accept it for the reasons stated by the representative of Australia.

44. **Mr. Blake-Lawson** (United Kingdom) and **Mr. Bokama Olenkongo** (Observer for the Democratic Republic of the Congo) said that their delegations agreed with those that did not wish to change draft article 92 or add a draft article 92 bis.

45. **Mr. Sharma** (India) said with regard to subparagraph (a) of Sweden's proposal that, although his delegation was willing to discuss some of the problems concerning multimodal transport in draft article 27, it did not wish to allow for a reservation or declaration that would change the nature of the draft convention. With regard to subparagraph (b) of the proposal, as many delegations had said, the limits of liability in draft article 61 were part of a compromise package. The proposal for two layers of liability limits was creative but would not strengthen the maritime field. It would not be clear to users of the system when the various declarations would begin and end and what amount of limitation would apply to a given country at a given time. For all those reasons his delegation could not support the proposal.

46. **Ms. Czerwenka** (Germany) said that her delegation supported Sweden's proposal for a new draft article 92 bis.

47. **The Chairperson** said he took it that the majority of the Commission did not wish to approve the proposed draft article 92 bis.

48. *It was so decided.*

The meeting was suspended at 4.25 p.m. and resumed at 5 p.m.

Draft article 93

49. **Ms. Halde** (Canada) said that a minor technical correction was necessary in draft article 93, paragraph 1, second sentence, which read: "The declarations permitted by article 94, paragraph 1, and article 95, paragraph 2, should be made at the time of signature, ratification, acceptance, approval or accession." As it happened, paragraph 1 of draft article 94, which concerned a declaration by a contracting State with two or more territorial units that the convention was to extend to all its territorial units or only to one or more of them, permitted the contracting State to amend its declarations "at any time". The inconsistency between the two provisions could be corrected by referring to "the initial declaration" in draft article 93, paragraph 1.

50. **Mr. Morán Bovio** (Spain) said that his delegation could support the proposal of Canada, which, having a provincial system, would naturally be alert to such situations.

51. **Ms. Downing** (Australia) said that her delegation supported the Canadian proposal.

52. **Ms. Carlson** (United States of America) said that the point raised was not an issue for her delegation, since it did not intend to take advantage of draft articles 94 and 95, but it appeared that a similar situation prevailed with respect to declarations permitted by draft article 95, paragraph 2.

53. **Mr. Delebecque** (France) agreed that under draft article 95, paragraph 2, a regional economic integration organization was required to make not only an initial declaration but subsequent declarations as well. The adjective "initial" therefore applied to declarations under draft article 95 as well as those under draft article 94 and could simply be inserted before the word "declarations" in the second sentence of draft article 93, paragraph 1.

54. *Draft article 93, as amended, was approved in substance and referred to the drafting group.*

Draft article 94

55. **Ms. Halde** (Canada) said that her delegation wished to propose an amendment to the so-called "federal clause", specifically to draft article 94, paragraph 3, for the sake of consistency with other conventions, such as those of the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Convention on Choice of Court Agreements. Draft article 94 had been drawn directly from the text of the article 93 of the United Nations Convention on Contracts for the International Sale of Goods. The purpose of paragraph 3 of the provision in the Sales Convention was to provide an interpretation of the term "place of business" so that it would be tied to a territorial unit of a State rather than the State as a whole for purposes of the scope of application of the Convention. For example, if Canada became a party to the Sales Convention and declared that it extended to some of its territorial units but not to Saskatchewan, in the case of a sales contract between a company in Chile and a company in Saskatchewan the convention would not apply, and paragraph 3 would make that clear.

56. However the term "place of business" found in draft article 94, paragraph 3, was not used elsewhere in the draft convention, except in the definition of "domicile". The key notion that required interpretation in order to be able to see clearly how the convention rules would apply if the convention did not extend to

all the territorial units of a contracting State was the location of several connecting factors in a contracting State. In draft article 5, paragraph 1, for example, the connecting factors that determined the scope of application of the convention were the location of the place of receipt, the port of loading, the place of delivery or the port of discharge in a contracting State. Other provisions that set out connecting factors were draft article 1, paragraph 28, draft article 20, paragraph 1 (a), and draft article 69, paragraph 1 (b). Her delegation therefore proposed to amend to draft article 94, paragraph 3, to read:

> "If, by virtue of a declaration pursuant to this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the relevant connecting factor for the purposes of article 1, paragraph 28, article 5, paragraph 1, article 20, paragraph 1 (a), and article 69, paragraph 1 (b), is considered not to be in a Contracting State unless it is in a territorial unit to which the Convention extends."

Other drafting approaches could be taken, but the above suggestion was relatively simple and not inconsistent with drafting approaches used elsewhere.

57. **Ms. Czerwenka** (Germany) said that her delegation supported the substance of the proposal, provided it was drafted carefully in order to fit with the rest of the draft convention. For example, in draft article 5, not all of the connecting factors mentioned needed to be located in the contracting State for the convention to apply, and if one of them was located in another contracting State, the convention would apply in any case. The words "located in that State", which appeared in the current text, were missing from the new proposal. Some careful drafting was in order but that could be handled by the drafting group.

58. **Mr. Miller** (United States of America) said that his delegation agreed with the substance of the Canadian proposal. Although the draft article had no impact on the United States, his delegation was happy to accept its inclusion since it was important to his country's largest trading partner. He agreed with the representative of Germany that there were some drafting details to be worked out. The real issue was not that the connecting factors were in a contracting State but that the places mentioned in the relevant articles would not be considered to be in a contracting State if they were located in a territorial unit excluded from the convention. In the hypothetical example in which Canada, in a declaration under article 94, excluded Saskatchewan, that would mean that a shipment originating in Saskatchewan would not for that reason alone be covered by the convention, although a shipment from Saskatchewan to a contracting State would be covered; and for the purposes of article 69, Saskatchewan would be excluded as one of the available forums, so that the convention would not guarantee access to a Saskatchewan court. With that understanding of the Canadian proposal, his delegation thought that it was a good suggestion and that appropriate language should be worked out to give effect to it.

59. **Mr. Morán Bovio** (Spain) supported the Canadian proposal in principle. The drafting group should determine the new wording.

60. **Mr. Sato** (Japan) said that although draft article 94 was not significant for Japan, his delegation supported the Canadian proposal in the interest of all countries that required a federal clause. A change in draft article 94, however, was relevant not only to the four other provisions already mentioned, but perhaps to others as well in which there was a reference to a contracting State, such as draft article 1, paragraph 29. That technical issue should be carefully scrutinized by the drafting group.

61. *Draft article 94, as amended, was approved in substance and referred to the drafting group for redrafting to reflect the debate.*

Draft article 95

62. **Mr. Imorou** (Benin) proposed deleting the first part of the last sentence of paragraph 1, "When the number of Contracting States is relevant in this Convention", retaining simply the statement that a regional economic integration organization did not count as a contracting State. Logically, then, paragraph 3, which essentially equated a contracting State and a regional economic integration organization, should also be deleted.

63. **Ms. Czerwenka** (Germany) said that it was important to retain both paragraph 1 and paragraph 3 as drafted. Benin's concerns were addressed in paragraph 1, which specified the instances in which a regional economic integration organization did not count as a contracting State.

64. **Mr. Morán Bovio** (Spain), concurring with the German delegation, observed that the inclusion of draft article 95 had been prompted by recent conventions such as the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), which also facilitated certain kinds of joint action by States through supranational regional organizations. The provision, which in any case limited the involvement of a regional economic integration organization in the last sentence of paragraph 1, was in no way detrimental to the draft Convention, even if it was never invoked.

65. **Mr. Sharma** (India) said that draft article 95 was intended to facilitate the inclusion of non-State entities which had the capacity to enter into contracts in matters covered by the draft Convention, when they were so mandated. Paragraphs 1 and 3 should be retained as drafted in the interests of global trade and freedom of contract. He saw no need to change the text and, indeed, the very phrase in the third sentence of paragraph 1 that Benin wished to delete clarified the intention.

66. **Mr. van der Ziel** (Observer for the Netherlands), noting that his country was a member of a regional economic integration organization, said that he endorsed the remarks of Germany and Spain.

67. **Mr. Imorou** (Benin) said that what concerned his delegation was that draft article 95 put subregional organizations on a par with States.

68. **Mr. Bellenger** (France) said that his Government interpreted the phrase "When the number of Contracting States is relevant in this Convention," to mean that a regional economic integration organization would not be counted among the number of contracting States necessary for the entry into force of the Convention or for its amendment. His delegation supported the current text of draft article 95.

69. **Mr. van Houtte** (Observer for the European Commission) said that as a representative of a regional economic integration organization, he urged the Commission to maintain the wording of draft article 95 as it stood, since it envisaged the normal way in which regional organizations participated in instruments like the draft convention. If the initial clause of the third sentence of paragraph 1 was deleted, the rest of the sentence would be unclear.

70. **Ms. Carlson** (United States of America), observing that weight should be given to the opinion of one of the regional organizations in question, said that draft article 95 should be retained in its current form.

71. **Ms. Markovčić Kostelac** (Observer for Croatia) said that her delegation supported retaining the current text of draft article 95. The provision had become a standard clause in similar international conventions adopted in recent years.

72. *Draft article 95 was approved in substance and referred to the drafting group.*

Draft articles 96 (Entry into force), 97 (Revision and amendment) and 98 (Denunciation of this Convention)

73. *Draft articles 96 to 98 were approved in substance and referred to the drafting group.*

Draft article 84 (International conventions governing the carriage of goods by other modes of transport) (continued)

74. **Mr. Sato**, reporting on the informal consultations on draft article 84, explained, for the sake of those delegations uncomfortable with the text, that the article was needed because draft article 27 did not cover the conflict of conventions situations dealt with in draft article 84, where, notwithstanding draft article 27, the type of carriage of goods envisaged entailed the overlapping application of both the draft convention and one or another of the unimodal transport conventions, for example, when a road cargo vehicle was placed aboard a ship with goods loaded. Similarly, an amendment of limitation levels in one of the unimodal conventions, which was likely to happen in the near future, would conflict with the limits in the draft convention, and again draft article 27 would not suffice to resolve the conflict.

75. It had consequently been decided to amend the chapeau of draft article 84 by inserting after the phrase "in force at the time this Convention enters into force", the phrase "including any future amendment thereto". The proposed amendment did not allow broad incursions into the draft regime because the situations dealt with in each of the subparagraphs were strictly limited in scope. It served the important purpose of softening the overly restrictive current wording of the chapeau, allowing some flexibility for future development of the law through amendments to existing conventions. The text referred in only generic

terms to international conventions because, unlike the case of draft article 88, they were too numerous to be specifically listed.

76. *Draft article 84, as amended, was approved in substance and referred to the drafting group.*

The meeting rose at 6.05 p.m.

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Summary record of the 879th meeting
Held at Headquarters, New York, on Wednesday, 25 June 2008, at 3 p.m.

Chairperson: Mr. Illescas ..... (Spain)

Contents

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

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Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

08-39908 (E)

The meeting was called to order at 3.15 p.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645, A/CN.9/658 and Add.1-13; A/CN.9/XLI/CRP.7)

Draft article 49 (Delivery when a negotiable transport document or negotiable electronic transport record is issued) (*continued*)

1. **Mr. Sato** (Japan), introducing a proposal in respect of draft article 49 contained in A/CN.9/XLI/CRP.7 on behalf of the delegations that had participated in informal consultations, said that there had been very serious underlying disagreement from start to finish, and that the compromise version in the document before the Commission had been approved by a majority, but still over very strong opposition. In the proposed text, paragraph 1 of draft article 49 essentially reproduced the chapeau and subparagraphs (a) to (c) of the current text, except for a minor correction, and applied to all cases in which a negotiable transport document was issued. New paragraph 2, roughly covering the same ground as current subparagraphs (d) to (h), began with a new chapeau stating that the rule that followed applied if the transport document stated that the goods might be delivered without the surrender of the document, setting up an "opt-in" system that would be triggered by the transport document itself. In order to obviate anticipated objections by the banks, it was provided that the document itself must indicate the possibility of delivery without surrender. Another change was that new paragraph 2 (a), unlike the current subparagraph (d), had the carrier simply requesting instructions from the shipper and placed no obligation on the shipper to provide them, since the shipper was not always in a position to do so. In addition, whereas the current subparagraph (d) made notice to the holder the precondition for the remainder of the paragraph, the new paragraph 2 (a) set out two possible situations in which paragraphs 2 (a) to (e) would apply: when the holder did not respond to notice or when the holder would not be located — a common problem. Where the transport document stated nothing about delivery without surrender, the rules in article 49, paragraph 1, would apply.

2. The new system had advantages and disadvantages. Strong arguments had been made for a default or "opt-out" rule, but the system presented in A/CN.9/XLI/CRP.7 had garnered the widest support in informal consultations. It should be noted that if the new text was adopted, consequential changes would need to be made to draft articles 47, 48 and 50.

3. **Mr. van der Ziel** (Observer for the Netherlands) said that the proposed new text did not undermine the value of the bill of lading but sought to deal with a structural problem common to the main commodities trades, where for trading reasons the terms of credit were often longer than the duration of the voyage of the goods, but where at times the voyage outlasted the period required for the trading of the goods. Two camps had formed during the fierce debate in informal consultations: there were those, led by the United Kingdom, who wanted to remove draft article 49 from the draft convention and turn it into a model law, and those, like his delegation, who felt very strongly that draft article 49 should stand as mandatory law. There had also been a basic disagreement about the value of an "opt-in" as against an "opt-out" system; although he would argue that there was not much difference between the two.

4. The key to whether new draft article 49, paragraph 2, would be applied in practice was in the hands of the banks, or more specifically of the International Chamber of Commerce (ICC) Banking Commission. In the commodities trade, letter of credit conditions required, without exception, the issue of a negotiable transport document, namely, the bill of lading; and the ICC Uniform Customs and Practice for Documentary Credits set out the requirements with which a bill of lading must comply to make it acceptable to banks. Should the ICC Banking Commission decide to issue a directive to banks not to accept a bill of lading conforming to the provisions of article 49, paragraph 2, that would mean that article 49 could not be applied in practice. Actually, each of the three commercial parties concerned — banks, commodity traders and carriers — would have to agree that the scheme in article 49, paragraph 2, was acceptable to them and that thenceforth all bills of lading could contractually conform to its provisions; but carriers and traders would have no option if the banks forbade it. Knowing how crucial ICC approval would be, the UNCITRAL secretariat had twice made presentations to it on features of the draft convention, including draft article 49. The bankers had been very attentive and generally positive, and ICC had touched

on the matter in an article published in the bimonthly magazine on letters of credit matters that it distributed worldwide to banks. Yet there had been no meaningful discussion within ICC, which had adopted a wait-and-see attitude.

5. In any case, the system established in the draft convention should be a matter of convenience for practitioners. Commodities trade was basically charterparty trade, which by reason of draft article 7 applied to deliveries; and the bill of lading was a very simple document referring to the terms and conditions of the charterparty, itself a document negotiated between two equal parties stating whether the carrier must deliver the cargo on instructions of the shipper with or without surrender of the document.

6. The chapeau of the new draft article 49, paragraph 2, would be improved if it were brought into line with the usual terminology of the bill of lading, and he would propose amending it to read: "If the negotiable transport document or the negotiable electronic transport record indicates, either expressly or through incorporation by a reference to the charterparty, that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rule applies."

7. **Mr. Schelin** (Observer for Sweden) said he believed that the system in paragraph 2 of the proposal, would only diminish the value of the bill of lading without solving the problem, because those trading in commodities without documents would have no way of knowing whether they were protected or not. Moreover, since draft article 48 required surrender of a non-negotiable transport document, in other words, a recta bill of lading, upon delivery, it was inconsistent not to require the surrender of a negotiable document. Furthermore, paragraph 2 touched on general principles of documents of title, and some jurisdictions would hesitate to adopt a draft convention that affected such general principles. Sometimes the industry benefited from having strict rules even if they caused some problems in the market. He believed that the principle in draft article 49 should be delivery against surrender of document — no more, no less. Consequently, his delegation would support paragraph 1 of the proposal but would prefer to delete paragraph 2.

8. **Ms. Downing** (Australia) said that, although her delegation preferred the proposal in A/CN.9/XLI/CRP.7 to the current text of draft article 49, the new proposal still did not address the concern that the function of the bill of lading as a document of title would be undermined. A bill of lading that did not have to be surrendered against delivery of the goods would simply not be considered a bill of lading in some jurisdictions. Even the proposed new wording made it too easy to extinguish title. The Australian banking industry had expressed concerns about potential loss of confidence in the bill of lading as a document of title, and it was questionable whether buyers would continue to make payment if holding a bill of lading did not represent constructive possession of the goods.

9. Moreover, the new version still did not resolve the carrier's problem of how to make delivery, since a prudent shipper would refrain from providing delivery instructions for fear of being sued for conversion. There were other ways for a carrier to deal with the problem. If it anticipated a problem at certain destinations or in certain trades, the carrier could require prepaid freight or it could include a clause to the effect that if the goods were not collected the carrier would return them to the shipper at the shipper's cost.

10. **Mr. Imorou** (Benin) said that his delegation fully shared the concerns regarding delivery without surrender of a transport document. With respect to shipments of goods covered by letters of credit, notice to the banker was essential. Paragraph 2 (d) of the new proposal spoke of a person that became a holder of the transport document "pursuant to contractual or other arrangements", without specifying whether such arrangements had to be written or could be oral; an oral arrangement could create problems. Paragraph 2 (e), second sentence, contained the clause: "When the contract particulars state the expected time of arrival of the goods". As it happened, draft article 38 on contract particulars did not include a mention of the time of arrival, and when the African States had proposed the inclusion of such a mention the proposal had not been accepted.

11. **Mr. Honka** (Observer for Finland) said that his delegation was in favour of a certain amount of innovation over the status quo. Draft article 49 sought to solve a perennial problem in shipping that occurred when goods arrived before the bill of lading. The proposal in A/CN.9/XLI/CRP.7 had improved the text by offering an "opt-in" alternative in the chapeau of its paragraph 2. The proposed text represented less of a

deviation from tradition and might therefore meet with greater acceptance. It should be recalled that even if the bill of lading stated that the goods could be delivered without the surrender of the transport document, the subparagraphs that followed set additional conditions for such delivery, so that the proposed change did not entail a major departure from the traditional function of the bill of lading. Since bills of lading already included many standard clauses, the addition of such a statement to a bill of lading was not an unreasonable request; the verb "states" should be retained. Sweden's concern about recta bills of lading had merit, but contradiction could be avoided by a few changes to draft article 48. As the representative of Japan had pointed out, if the proposal was adopted, some consequential changes would be necessary in other draft articles.

12. **Mr. Mollmann** (Observer for Denmark) said that the task before the Commission was simply to decide whether the new version was an improvement; otherwise the current wording of draft article 49 would be retained. His delegation had advocated mandatory legislation on the point in the draft convention and would prefer an opt-out regime where the provisions of draft article 49 would apply if nothing to the contrary was stated in the transport document. That would force the industry to take a stand if it wished to maintain the status quo, as it would not have to do with an opt-in regime. Another reason for preferring an opt-out regime was the point made by Australia that a bill of lading containing a statement that the goods could be delivered without surrender of the transport document might not be considered a bill of lading in some jurisdictions. The safeguards provided in the current text would be sufficient to protect the parties concerned. The problem being addressed was encountered chiefly in bulk trade, and banks and commodity traders were quite capable of figuring out how to protect themselves using the safeguards provided; holders of bills of lading would have the warning before them on the transport document.

13. Although his delegation preferred the mandatory rule in the current text, it could support the new version, but would prefer an opt-out formula. If the opt-in formula was retained, his delegation would support the Netherlands' proposed amendment to the chapeau of the new paragraph 2 in order to address the situation, typical in the bulk trade, in which a tramp bill of lading merely referred to the terms of a charterparty. In either case, the matter would be out of the Commission's hands, and those in the industry could decide whether or not to use the provision to solve their problem.

14. **Mr. Delebecque** (France) said that his delegation was still strongly in favour of simply deleting subparagraphs (d) to (h) of the current text, but in the spirit of compromise could accept the new version. However, it could only accept an opt-in formula and would oppose allowing paragraph 2 to apply simply by reference to a charterparty. The transport document itself must "state clearly" that the goods might be delivered without the surrender of the transport document. He had the impression that the Commission was trying to force banks to do without a document they considered necessary; his delegation did not feel in a position to judge for the banks what their needs were.

15. **Mr. Blake-Lawson** (United Kingdom) said that unfortunately the new version of draft article 49 did not resolve his delegation's concerns. He wondered if the failure of the ICC Banking Commission to comment on the provision indicated tacit acceptance or outright incredulity. The procedures detailed in draft article 49 would increase the risk of fraud. Either an opt-in or an opt-out alternative could lead to further fracturing of international trade and complicate matters for carriers. The wisest course would be to delete all of chapter 9 on delivery of the goods and rethink the problem. However, in the spirit of the Working Group, his delegation would accept the decision of the majority.

16. **Mr. Gombrii** (Norway) said that there did seem to be a problem in certain trades where the parties were using bills of lading when bills of lading were not the appropriate instrument. As the representative of Australia had pointed out, there were alternatives, but practitioners seemed reluctant to resort to them. Those trades, however, were the exception; bills of lading functioned properly in thousands of transactions every day. His delegation had objected to a default rule that would erode the quality of the bill of lading as a document of title and, if the provisions in paragraph 2 of the new version were to be retained, it was strongly in favour of an opt-in formula. The proposed new version was more likely to be workable than the current one; the carriers, the commodity traders and the banks could make the system work if they could agree among themselves. The question of recta bills of lading

had arisen; they fell under the definition of draft article 48 and did not need to be accommodated under draft article 49.

17. With regard to the Netherlands' proposed amendment to the chapeau of paragraph 2 of the new version, his delegation would prefer to retain the word "states", which was stronger than "indicates" and was not in favour of adding the possibility of incorporation by reference to a charterparty. Often there were long chains of charterparties relating to the same cargo, and it was difficult to know precisely what terms and conditions applied. It was better, especially for the master responsible for delivering the goods, for it to be clearly stated on the bill of lading itself that the goods could be delivered without surrender of the transport document.

18. **Mr. Sato** (Japan) pointed out that a statement on a transport document that the goods could be delivered without surrender of the document might be valid in some jurisdictions, invalid in others. In those cases in which it was considered valid, the new paragraph 2 sought to ensure that there was a procedure to be followed. Delegations that advocated simply deleting paragraph 2 should be aware that they might be leaving the procedure entirely to the discretion of the carrier.

19. **Mr. Essigone** (Gabon) said that the version in A/CN.9/XLI/CRP.7 was certainly clearer thanks to the division into two paragraphs. Paragraph 1 emphasized the proper role of a bill of lading as conferring the right to receipt of the goods, thus giving it the weight of a bank draft. Paragraph 2, however, affected another important actor in maritime trade, namely, the banks. To involve banks in a system without prior consultation with the banking sector could lead to problems. Paragraph 2 should be revised to be acceptable to banks.

20. **Mr. Alba Fernández** (Spain) said that in principle, he favoured the proposal contained in document A/CN.9/XLI/CRP.7 because it addressed some of the concerns of delegations that preferred to let national courts settle issues related to negotiable transport documents. In practice, the "opt-in" rule would represent the smallest possible departure from traditional rules.

21. He would prefer for the chapeau of paragraph 2 to contain more explicit language requiring the parties to adhere to the rules set out in subparagraphs (a) to (e). Some bills of lading contained technical specifications with a specific purpose, which showed that the industry could adapt its documents and practices to particular legal situations.

22. **Mr. Miller** (United States of America) said that the issue was a difficult one, as was often the case in commercial law when risk must be allocated between two innocent parties. He recognized the need to address the concerns of the banking industry. However, the proposal attempted to address a real problem that arose in practice, which the Commission should make an effort to solve. He therefore supported paragraph 2 of the proposal with the amendment put forward by the delegation of the Netherlands concerning incorporation by reference, which, despite the risks involved, would make the solution more effective.

23. **Mr. Berlingieri** (Italy) said that in the past, the bill of lading had travelled more slowly than the ship carrying the cargo; that problem had been solved by allowing the person to whom the bill of lading was to be delivered to contact the carrier, present a bank guarantee and collect the goods. That situation had changed over time, but it seemed to him that a document that was not the surrender document and did not grant constructive possession of the goods could not be defined as a negotiable transport document.

24. His delegation could not agree to the changes proposed by the representative of the Netherlands; he would prefer to insert "expressly" before "states" in the chapeau of paragraph 2. He would have the same objection to incorporating an arbitration clause simply by reference to the charterparty containing it. In Italy, if a bill of lading stated that it was issued in accordance with a specific charterparty and an arbitration clause contained in that charterparty was subsequently invoked, the courts would consider that there was no incorporation since the arbitration clause was not mentioned in the bill of lading. The solution was to require the document to contain an explicit statement that would alert third parties to the fact that it established conditions different from those that would normally be essential to a negotiable transport document.

25. He had doubts about the body of paragraph 2. Subparagraph (a) used the word "may" in referring to the carrier's options, but the carrier was still entitled to avail itself of the procedures set forth in draft article 50 in respect of undelivered goods. It might therefore be advisable for subparagraph (a) to contain a statement

along the lines of "without prejudice to article 50". Furthermore, subparagraph (c) stated that the person giving instructions under subparagraph (d) must indemnify the carrier against loss arising from its being held liable to the holder. Since such liability could no longer apply to delivery of the goods to the holder, the reference would seem to be to the carrier's substantial obligation to deliver them in the condition in which they had been received. Yet subparagraph (e), a reference to which was included in subparagraph (c), stated that liability arose only if the holder became a holder after the goods had been delivered. The position of a holder who became a holder prior to delivery should be clarified.

26. In the spirit of compromise, his delegation was prepared to support the proposal, provided that the changes it had requested were made.

27. **Ms. Talbot** (Observer for New Zealand) said that the proposal was an improvement over the previous version of draft article 49; her delegation preferred the "opt-in" approach embodied in the chapeau of the new paragraph 2.

28. **Mr. Elsayed** (Egypt) said that the draft article contained highly technical issues that were difficult to address. While he appreciated the efforts of the delegations of Australia and Italy, the result had been to further complicate the problem. Unless the changes proposed by the representative of Italy were made, he would prefer to adopt the United Kingdom's proposal to delete all of chapter 9, including draft article 49. The issues raised therein could then be addressed in practice and through a model law.

29. **Ms. Czerwenka** (Germany) said that her delegation was prepared to support the proposal as the outcome of informal consultations in which many positions had been reflected. She could not agree to the changes proposed by the observer for the Netherlands, but had no objection to the amendments suggested by the representative of Italy. If delegations could not accept the proposed new version of draft article 49 and reverted to the current text, she would prefer to delete subparagraphs (d) through (h).

30. **Mr. Sharma** (India) said that his delegation was satisfied with the current text of draft article 49 but was prepared in principle to accept the compromise proposal. There seemed to be general agreement on paragraph 1, which reflected normal practice; his delegation could also accept paragraph 2 with the amendments suggested by the representative of Italy. However, he could not support the suggestions made by the observer for the Netherlands, which might dilute the negotiable quality of the transport document.

31. **Mr. Mayer** (Switzerland) said that the proposal represented a valid compromise, which made substantial concessions to the delegations that had argued for the deletion of draft article 49, subparagraphs (d) through (h). As the observer for Finland had rightly stated, the new text did not constitute a serious deviation from the principles applying to bills of lading. He failed to understand the position of the delegations which felt that the holder's interests were still not adequately protected. The choice was between the current text of the draft article and the proposed new one, and the latter was a clear improvement over the former.

32. His delegation could accept the chapeau of paragraph 2 as proposed with the addition of a reference to draft article 50 as suggested by the representative of Italy. He agreed with the delegations of Finland and Sweden that there might be some inconsistency in the treatment of recta bills of lading that should be addressed; in principle, however, he was prepared to accept the proposal.

33. **Mr. Tsantzalos** (Greece) said that his delegation could accept the proposed new text with the amendment to the chapeau of paragraph 2 that the delegation of the Netherlands had put forward.

34. **Mr. Hu** Zhengliang (China) said that for the most part, he shared the views expressed by the observer for Sweden. Draft article 49 established rules governing the delivery of the goods; because delivery was such an important aspect of carriage, those rules needed to be clearly understood. The current text was complicated and the proposed new text was even more so. It was rare for a negotiable transport document to state that the goods could be delivered without surrender of the document. Moreover, under many legal systems, including that of China, such a statement would be invalid, and he would prefer for the draft convention not to contemplate the consequences of its inclusion. He also agreed that paragraph 2 of the proposal might give rise to commercial fraud by the shipper and damage the credibility of negotiable bills of lading.

35. **Mr. Schelin** (Observer for Sweden) said he shared the representative of Italy's fear that the draft article might deprive the bill of lading of its character

as a negotiable transport document. However, if the majority of delegations were in favour of the proposal, his delegation would like to see the word "expressly" inserted before "states".

36. **Mr. Sandoval** (Chile) said that his delegation supported the proposed new text of draft article 49.

37. **Mr. Imorou** (Benin) asked if the representative of Japan could explain whether paragraph 2 (d) of the proposal referred to oral as well as written arrangements. Furthermore, he wished to reiterate the point that subparagraph (e) described a situation in which the contract particulars stated the expected time of arrival of the goods, whereas draft article 38 on contract particulars made no mention of time of arrival.

38. **Mr. Sato** (Japan) said that he could not answer the questions raised by the representative of Benin with certainty, because the wording in question was taken from the current text of draft article 49, subparagraphs (g) and (h), respectively. He thought that the "arrangements" mentioned would involve a sales contract or letter of credit, both of which were written documents; theoretically, an oral agreement could also constitute a contractual or other arrangement made before delivery, since the provision did not state the contrary, but that would be quite unusual. The reference to a situation in which the contract particulars stated the expected time of arrival of the goods had been included in paragraph 2 (e) in order to cover such an eventuality; it was not mentioned in draft article 38 because the Working Group had considered it unwise to require carriers to include such a statement in all contracts.

39. He thought that the carrier could rely on draft article 50 without taking any of the steps envisaged in draft article 49; it could, for instance, store undelivered goods without requesting the shipper's consent. However, he had no objection to adding a reference to draft article 50 in paragraph 2 (a) of draft article 49 as the representative of Italy had suggested. His own delegation was prepared to accept the compromise proposal with the addition of a reference to draft article 50.

40. **The Chairperson** said that most delegations seemed to consider the version of draft article 49 contained in document A/CN.9/XLI/CRP.7 to be a good compromise. There also seemed to be significant support for the Italian delegation's proposal to replace "states" by "expressly states" in the chapeau of the new paragraph 2 and some support for its proposal to insert the phrase "without prejudice to article 50, paragraph 1" in the new paragraph 2 (a).

41. **Mr. van der Ziel** (Observer for the Netherlands), supported by **Mr. Miller** (United States of America), said that, according to his calculations, the Dutch and Italian proposals enjoyed the same degree of support; the majority of delegations, however, seemed to be in favour of leaving the proposed version of draft article 49 contained in document A/CN.9/XLI/CRP.7 unchanged.

42. **Mr. Mollmann** (Observer for Denmark) endorsed the comments made by the representatives of the Netherlands and the United States and pointed out that it should not be assumed that delegations that preferred "states" rather than "indicates" in the chapeau of paragraph 2 were also in favour of the phrase "expressly states".

43. **Mr. Delebecque** (France) said that the French proposal was similar to the Italian proposal, which he supported.

44. **Mr. Schelin** (Observer for Sweden) said that his delegation supported the Chairperson's comments. It was important to bear in mind that some delegations had called for paragraph 2 to be deleted altogether.

45. **Ms. Czerwenka** (Germany) said that, even though her delegation had expressed its support for the version of draft article 49 contained in document A/CN.9/XLI/CRP.7, it understood "states" and "expressly states" to mean the same and could, therefore, accept either term.

46. **Mr. Hu** Zhengliang (China) expressed the hope that his delegation's preference for the deletion of paragraph 2 altogether would be taken into account.

47. **Mr. Sandoval** (Chile) said that, when he had spoken previously, it had been on the assumption that the Italian proposal to insert the word "expressly" had already been approved.

48. **The Chairperson** noted that those delegations that had expressed support for the Italian proposal had done so because they opposed the Dutch proposal; the two proposals could not therefore be said to enjoy the same degree of support. Having listened carefully to all the comments made, he stood by his initial conclusion that the majority of the Commission members wished to approve the version of draft article 49 contained in

document A/CN.9/XLI/CRP.7, with the changes proposed by the representative of Italy.

49. *Draft article 49, as amended, was approved, in substance and referred to the drafting group.*

Consequential changes to draft article 47 (Delivery when no negotiable transport document or negotiable electronic record is issued), draft article 48 (Delivery when a non-negotiable transport document that requires surrender is issued) and draft article 50 (Goods remaining undelivered)

50. **Mr. Sato** (Japan) said that, as a consequence of the approval of the amended draft article 49, a number of technical changes needed to be made to draft articles 47, 48 and 50.

51. Draft article 47, subparagraph (c), should read:

> "(c) Without prejudice to article 50, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, or (ii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;".

52. Draft article 48 (b) should read:

> "(b) Without prejudice to article 50, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, or (iii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;".

53. Lastly, in draft article 50, paragraph 1 (b), the words "the holder" should be inserted after the words "the controlling party".

54. **Mr. Mayer** (Switzerland) endorsed the changes that had been proposed but wondered whether a clause similar to that in draft article 48 (b) (iii) was also needed in draft article 49.

55. **Mr. Sato** (Japan) agreed that such a clause might well be necessary but he was not in a position at the moment to propose exact language.

56. **Ms. Shall-Homa** (Nigeria) proposed aligning the title of draft article 49 with the title of draft article 48 by inserting the phrase "that does not require surrender" after "negotiable electronic transport record".

57. **Ms. Czerwenka** (Germany), supported by **Mr. Sharma** (India), said that draft article 49 had been discussed at length and should not be changed any further. Paragraph 2 of draft article 49 provided an exception to the rule established in paragraph 1; the amendment proposed by the representative of Nigeria would give the wrong impression as to the draft article's content.

58. *The consequential changes to draft articles 47, 48 and 50 were approved in substance and referred to the drafting group.*

The meeting rose at 6 p.m.

United Nations A/CN.9/SR.880

General Assembly

Distr.: General
13 August 2008

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United Nations Commission on International Trade Law

Forty-first session

Summary record of the 880th meeting
Held at Headquarters, New York, on Thursday, 26 June 2008, at 10 a.m.

Chairperson: Mr. Illescas ..... (Spain)

Contents

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

Adoption of the report of the Commission

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of this document* to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

08-40081 (E)

The meeting was called to order at 10.15 a.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/645; A/CN.9/XLI/CRP.1/Add.1-4 and CRP.8)

Draft preamble

1. **The Chairperson** invited the Commission to consider the draft preamble to the draft convention contained in A/CN.9/XLI/CRP.8.

First preambular paragraph

2. **Mr. Morán Bovio** (Spain) thanked the Commission secretariat for its prompt drafting of a preamble to the draft convention, in response to his delegation's request, and expressed his complete satisfaction with the text. The preamble, which would facilitate the interpretation of the convention and shed light on the work of the Commission over the previous six years, might require some minor changes, which could be handled by the drafting group.

3. The fact that the first paragraph of the draft preamble had appeared in other United Nations conventions did not diminish its validity in the least, as it clearly stated the ideals of the Organization that informed the Commission's work. Therefore, he fully supported the retention of the first preambular paragraph as drafted.

4. **Mr. Sharma** (India) suggested that "reaffirming their belief" should be changed to read "reaffirming the belief", as the belief being expressed was universal and therefore not limited to States parties.

5. **Ms. Anki Dosso** (Benin) proposed that "friendly relations among States" should be changed to read "trade relations among States".

6. **Mr.** Ibrahima Khalil **Diallo** (Senegal) expressed his satisfaction with the text as it stood. Although the suggestion made by the representative of India had some merit, the first paragraph should be retained in its current form.

7. **The Chairperson** took it that the Commission approved the first paragraph as drafted.

8. *The first preambular paragraph was approved.*

Second preambular paragraph

9. **Ms. Hu** Shengtao (China) proposed that in the phrase "international trade law, in reducing or removing legal obstacles to the flow of international trade", the word "trade" should be replaced by the word "transportation", since the draft convention specifically dealt with transportation law, rather than trade law in general. The proposed change would also underscore the relationship between transportation and international trade development.

10. **Mr. Sekolec** (Secretary of the Commission) welcomed the Commission's comments and explained that the wording of the second paragraph had been taken from General Assembly resolution 48/34.

11. **Ms. Anki Dosso** (Benin) suggested that the second paragraph should state that the progressive harmonization and unification of international trade law contributed not only to universal economic cooperation but also to development.

12. **Ms. Carlson** (United States of America) partially endorsed the Chinese proposal. She noted that if the word "trade" was replaced by the word "transportation" only the first time it appeared in the paragraph, but not the second, the text would then reflect the point the representative of China had made about the relationship between transportation and trade.

13. **Mr. Morán Bovio** (Spain) said that he supported the retention of the second paragraph in its current form. The first paragraph introduced in very broad terms the ideals that had inspired the convention. The next logical step was to articulate in general terms the need to remove obstacles to international trade through harmonization and unification of international trade law; specific references to transport law followed in the third paragraph.

14. **Mr. Sato** (Japan) said that he favoured retention of the paragraph as drafted, as it fit into the coherent internal logic of the draft preamble.

15. **Mr. Maradiaga** (Honduras) said that he agreed with the remarks of the representative of Spain and supported retention of the current wording, which was systematic and coherent.

16. **Mr. Berlingieri** (Italy) requested clarification on whether General Assembly resolution 48/34 dealt with trade law or transportation law. If the latter was the case, no changes should be made to the second

paragraph. However, if that resolution dealt with trade law, he disagreed with the view of the representative of Japan on the coherence of the second paragraph within the draft preamble. Replacing the first use of the word "trade" with the word "transportation" made sense because the sentence would then convey the idea of the effect of international transportation law on the flow of international trade.

17. **The Chairperson** clarified that General Assembly resolution 48/34 related to the Hamburg Rules.

18. **Mr. Elsayed** (Egypt) proposed that the phrase "legal obstacles" should be expanded to read "legal and procedural obstacles". He also requested a correction to the Arabic version.

19. **Mr. Chong** (Singapore) said that his delegation supported the Chinese proposal. He could not agree with the argument put forward by the representative of Japan; it was logical for the second paragraph to speak to the general concept of progressive harmonization and unification of international transport law, examples of which were then cited in the third paragraph.

20. **Mr. Sandoval** (Chile) said that he supported the retention of the second paragraph as drafted, as it indeed referred to the progressive harmonization and unification of international trade law. Transport law was only a subset of international trade law, which the Commission had been working to develop for several years. Specific references to transport in the third paragraph indicated the logical progression behind the structure of the draft preamble in its current form.

21. **Ms. Sobekwa** (South Africa) said that she supported the proposals made by the representatives of China and the United States because the draft convention specifically dealt with transport law.

22. **Ms. Czerwenka** (Germany) said that her delegation preferred to retain the current text. Although transportation law was indeed part of trade law, the third and sixth paragraphs went on to refer specifically to carriage of goods and its importance in promoting trade, addressing the concerns expressed by some delegations.

23. **Mr. Imorou** (Benin) said that it was logical for the second paragraph to refer specifically to transport, as the first paragraph dealt with international trade. Therefore, he endorsed the suggestions made by the representatives of China and the United States.

24. **Mr. Sharma** (India) said that he favoured retention of the current text in light of its relationship to the Hamburg Rules.

25. **Mr. Essigone** (Gabon) said that it was much wiser to retain the current text, given that transport law was an integral part of trade.

26. **Mr. Serrano Martínez** (Colombia) noted that the explanation of the origin of the second preambular paragraph should suffice to support retention. In any case, international trade law encompassed transport law.

27. **Mr. Honka** (Observer for Finland) said that his delegation had no strong views on the second paragraph but supported retention of the text as drafted.

28. **Mr. Sekolec** (Secretary of the Commission) said that, since the wording of the second paragraph had been taken directly from the General Assembly resolution, which existed in Arabic, he would present the Arabic version of the resolution to the representative of Egypt in order to address his concerns. If any additional improvement proved necessary, it would be handled by the Secretariat.

29. **The Chairperson** said that, since there was insufficient support for the suggested amendments, he took it that the Commission wished to approve the second paragraph as it stood.

30. *The second preambular paragraph was approved.*

Third preambular paragraph

31. **Mr. Imorou** (Benin) said that the third paragraph, which made a historical reference to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading and its amending Protocols, should also mention its additional Protocols.

32. **The Chairperson** suggested the deletion of the word "amending" in order to avoid an unwieldy sentence.

33. *The third preambular paragraph, as amended, was approved.*

Fourth preambular paragraph

34. **Ms. Anki Dosso** (Benin) said that it would be more logical to reverse the order of the verbs "modernize" and "consolidate".

35. *The fourth preambular paragraph, as amended, was approved.*

Fifth preambular paragraph

36. **Mr. Berlingieri** (Italy), supported by **Mr. Elsayed** (Egypt) and **Mr. Delebecque** (France), proposed that "various modes of transport" should be replaced by "other modes of transport".

37. *The fifth preambular paragraph, as amended, was approved.*

Sixth preambular paragraph

38. *The sixth preambular paragraph was approved.*

39. *The draft preamble as a whole, as amended, was approved in substance and referred to the drafting group.*

Adoption of the report of the Commission

Chapter III (Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea)
(A/CN.9/XLI/CRP.1/Add.1-16)

Introduction and consideration of draft articles, chapters 1 and 2 of the draft convention
(A/CN.9/XLI/CRP.1/Add.1)

40. **Ms. Downing** (Australia) said that she wished the position of her delegation on draft article 5 to be more fully reflected. She accordingly proposed that the first sentence of paragraph 11 of A/CN.9/XLI/CRP.1/Add.1 should be placed at the end of paragraph 10, supplemented by the following: "One delegation proposed new subparagraphs 1 (d) and (e) and new paragraph 3 to try to achieve this". Paragraph 11 would then begin with the words "It was pointed out ...".

41. *It was so decided.*

42. **Ms. Czerwenka** (Germany) said that, since the proposal referred to in the first sentence of paragraph 12 concerning draft article 5 had been made by her delegation, she wished it to reflect more accurately Germany's position. The words "Another proposal was to limit ..." should be replaced by "Another proposal was to open the possibility for limiting ...".

43. *It was so decided.*

44. **Mr. M'inoti** (Kenya) pointed out an inconsistency in the draft report, which referred in some cases to the Commission and in others to the Commission Group, for example, in paragraph 14.

45. **The Chairperson** said that it should refer in every case to the Commission and would be corrected.

46. *The section of the draft report on the Introduction and on consideration of draft articles, chapters 1 and 2 of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.1), as amended, was adopted.*

Consideration of draft articles, chapter 2 (continued), together with draft article 82, and chapters 3 and 4 of the draft convention and related definitions
(A/CN.9/XLI/CRP.1/Add.2)

47. **Ms. Downing** (Australia) said that, in paragraph 7 of A/CN.9/XLI/CRP.1/Add.2, her delegation would appreciate the insertion after the first sentence of the following words: "One State reiterated its consistent and strong opposition to the inclusion of draft article 82 in its current form", and the addition, at the end of the paragraph, of the following sentence: "There was also a proposal to allow States to make a reservation with respect to draft article 82".

48. *It was so decided.*

49. **Ms. Talbot** (Observer for New Zealand) said that, in view of the importance of the compromise reached at the twenty-first session of the Working Group, alluded to in the penultimate sentence of paragraph 9 and the last sentence of paragraph 12, it might be appropriate to insert explicit cross-references for the sake of greater clarity.

50. *It was so decided.*

51. *The section of the draft report on consideration of draft articles, chapter 2 (continued), together with draft article 82, and chapters 3 and 4 of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.2), as amended, was adopted.*

The meeting was suspended at 11.35 a.m. and resumed at 12.15 p.m.

Consideration of draft articles, chapter 4 (continued) of the draft convention (A/CN.9/XLI/CRP.1/Add.3)

52. **Ms. Czerwenka** (Germany), supported by **Mr. Schelin** (Observer for Sweden) and **Mr. Sato** (Japan), said that paragraphs 2 to 4 of A/CN.9/XLI/CRP.1/Add.3 reflected only one of the two interpretations of the meaning of draft article 12,

paragraph 3, discussed by the Commission. Accordingly, she proposed deleting the phrase "but that the carrier was prevented from limiting its period of responsibility to exclude the time after initial loading of the goods, or prior to final unloading of the goods" from paragraph 2. In addition, paragraphs 3 and 4 should be redrafted to read as follows:

> "3. Another interpretation was that draft article 12, paragraph 3, did not modify paragraph 1 but only aimed at preventing the carrier, even if it had concluded an agreement on the basis of draft article 14, paragraph 2, from limiting its period of responsibility to exclude the time after initial loading of the goods, or prior to final unloading of the goods. To that end, a suggestion was made that paragraph 3 could be moved to a position in the text immediately following paragraph 1, and that it could also be helpful to replace the opening phrase of paragraph 3 'For the purposes of determining the carrier's period of responsibility' by the words 'Subject to paragraph 1'. Some support was expressed for that possible approach.
>
> 4. There was agreement in the Commission that the different views that had been expressed on the possible interpretation of paragraph 3 illustrated that there could be some ambiguity in the text. However, the Commission was of the view that it could be possible to clarify the text so as to ensure a more uniform interpretation. The Commission agreed that revised text for the resolution of the apparent ambiguity in paragraph 3 should be considered, and that it would delay its approval of draft article 12 until such efforts had been pursued."

53. **Mr. Mollmann** (Observer for Denmark), supported by **Ms. Carlson** (United States of America) said that the amendments proposed by the representative of Germany gave the erroneous impression that there had been three different interpretations of draft article 12, paragraph 3. The proposed deletion of the last part of the second sentence of paragraph 2 gave particular cause for concern and his delegation therefore opposed the German proposal.

54. **The Chairperson** said that, if he heard no further objections, he would take it that the majority of the Commission wished to adopt the amendments proposed by the representative of Germany.

55. *It was so decided.*

56. **Mr. Elsayed** (Egypt) pointed out that paragraph 12 of the draft report did not reflect the Commission's final decision to delete draft article 13.

57. **Ms. Lannan** (International Trade Law Division) said that the Commission's final decisions on draft articles 12 and 13 were reflected in the section of the draft report contained in A/CN.9/XLI/CRP.1/Add.9.

58. **Ms. Downing** (Australia), referring to paragraph 15, said that, in order to reflect her delegation's position on draft article 14, the following should be inserted after the second sentence: "Concern was also expressed that a traditional responsibility of the carrier was now being left to freedom of contract".

59. *It was so decided.*

60. **Mr. Delebecque** (France), referring to paragraph 16, proposed inserting the following after the first sentence: "It was noted that draft article 83, subparagraph (b), could apply to cases in which the shipper assumed responsibility for handling in liner transportation".

61. *It was so decided.*

62. *The section of the draft report on consideration of draft articles, chapter 4 (continued), of the draft convention (A/CN.9/XLI/CRP.1/Add.3) as amended, was adopted.*

Consideration of draft articles, chapter 4 (continued) and chapter 5 of the draft convention
(A/CN.9/XLI/CRP.1/Add.4)

63. **Mr. Sato** (Japan), referring to the final sentence of paragraph 11 of A/CN.9/XLI/CRP.1/Add.4 concerning draft article 18, said that, in the interests of clarity, the words "in the Working Group" should be inserted after the words "in paragraph 3".

64. *It was so decided.*

65. **Mr. Elsayed** (Egypt) recalled that a number of African and Arab States had proposed amendments to paragraph 2 in addition to the deletion of paragraph 3 of draft article 18. In order to reflect that discussion, the first sentence of paragraph 9 of A/CN.9/XLI/CRP.1/Add.4 should begin: "The Commission heard strong expressions of support for

proposed amendments to draft article 18, paragraph 2, as well as for the deletion of draft paragraph 3".

66. *It was so decided.*

67. *The section of the draft report on consideration of draft articles, chapter 4 (continued) and chapter 5 of the draft convention (A/CN.9/XLI/CRP.1/Add.4), as amended, was adopted.*

The meeting rose at 1.05 p.m.

United Nations A/CN.9/SR.881

General Assembly

Distr.: General
25 August 2008

Original: English

United Nations Commission on International Trade Law
Forty-first session

Summary record of the 881st meeting
Held at Headquarters, New York, on Thursday, 26 June 2008, at 3 p.m.

Chairperson: Mr. Illescas ..... (Spain)

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Election of officers (*continued*)

Adoption of the report of the Commission (*continued*)

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

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Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

08-40087 (E)

The meeting was called to order at 3.15 p.m.

Election of officers (*continued*)

1. **Ms. Flores** (Bolivarian Republic of Venezuela), speaking on behalf of the Group of Latin American and Caribbean States, nominated Mr. Sandoval (Chile) for the office of Vice-Chairperson.

2. **Mr. Oyarzábal** (Observer for Argentina) and **Mr. Serrano Martínez** (Colombia) seconded the nomination.

3. *Mr. Sandoval (Chile) was elected Vice-Chairperson by acclamation.*

4. **Mr. Chong** (Singapore), speaking on behalf of the Group of Asian States, nominated Mr. Fujita (Japan) for the office of Vice-Chairperson.

5. **Mr. Sharma** (India), **Mr. Jung** Yongsoo (Republic of Korea), **Ms. Hu** Shengtao (China) and **Mr. Saripudin** (Observer for Indonesia) seconded the nomination.

6. *Mr. Fujita (Japan) was elected Vice-Chairperson by acclamation.*

Adoption of the report of the Commission (*continued*)

Chapter III (Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea) (continued) (A/CN.9/XLI/CRP.1/Add.1-16)

Consideration of draft articles, chapter 5 (continued) and chapter 6 of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.5)

7. *The section of the draft report on consideration of draft articles, chapter 5 (continued) and chapter 6 of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.5) was adopted.*

Consideration of draft articles, chapter 6 (continued) and chapter 7 of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.6)

8. *The section of the draft report on consideration of draft articles, chapter 6 (continued) and chapter 7 of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.6) was adopted.*

Consideration of draft articles, chapter 8 of the draft convention (A/CN.9/XLI/CRP.1/Add.7)

9. **Mr. Mollmann** (Observer for Denmark), referring to the fifth sentence of paragraph 4 of A/CN.9/XLI/CRP.1/Add.7 concerning draft article 38, said that in the interests of logic the word "necessarily" before the word "delayed" should be replaced by the word "unnecessarily".

10. *It was so decided.*

11. *The section of the draft report on consideration of draft articles, chapter 8 of the draft convention (A/CN.9/XLI/CRP.1/Add.7), as amended, was adopted.*

Consideration of draft articles, chapter 8 (continued) and chapter 9 of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.8)

12. **Ms. Downing** (Australia), referring to paragraph 15 of A/CN.9/XLI/CRP.1/Add.8 concerning draft article 49, proposed the addition of a sentence at the end of the paragraph, reading: "It was stated that discussions with banks had indicated that article 49 would result in banks having additional risks to manage.".

13. **Mr. Miller** (United States of America) said that the wording should be modified so as not to imply that it represented the view of all banks everywhere.

14. **Ms. Downing** (Australia) explained that the intention was to balance the statement in paragraph 17 that discussions with banks and commodities traders had indicated that they considered the new regime to present less risk for them. To satisfy the United States delegation, she proposed to revise the words "It was stated" to "One State emphasized".

15. *It was so decided.*

16. *The section of the draft report on consideration of draft articles, chapter 8 (continued) and chapter 9 of the draft convention (A/CN.9/XLI/CRP.1/Add.8), as amended, was adopted.*

Consideration of draft articles, chapter 9 (continued), chapter 10, chapter 4 (continued) and chapter 8 (continued) of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.9)

17. *The section of the draft report on consideration of draft articles, chapter 9 (continued), chapter 10, chapter 4 (continued) and chapter 8 (continued) of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.9) was adopted.*

Consideration of draft articles, chapters 11 and 12 of the draft convention (A/CN.9/XLI/CRP.1/Add.10)

18. *The section of the draft report on consideration of draft articles, chapters 11 and 12 of the draft convention (A/CN.9/XLI/CRP.1/Add.10) was adopted.*

Consideration of draft articles, chapter 12 (continued) and chapters 13 to 15 of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.11)

19. **Mr. Sato** (Japan), referring to paragraph 3 of A/CN.9/XLI/CRP.1/Add.11 concerning draft article 65, proposed inserting the words "or agreement" after "by declaration" in the last sentence, since under the Hague-Visby Rules, the time bar could be extended by agreement.

20. *It was so decided.*

21. **Ms. Downing** (Australia), referring to paragraph 13 concerning draft article 69, suggested inserting a sentence at the end of the paragraph to reflect a previous statement by her delegation about jurisdiction clauses in volume contracts. The sentence would read: "One example given was that such a State would be free to regulate jurisdiction issues arising out of a volume contract, including the circumstances in which a third party might be bound."

22. *It was so decided.*

23. **Mr. Sato** (Japan), referring to paragraph 25 concerning draft article 77, proposed inserting the words "or 'claimant'" after the phrase "the term 'plaintiff'" in the last sentence, so as to indicate clearly that neither "plaintiff" nor "claimant" were appropriate terms in that context.

24. *It was so decided.*

25. **Mr. van der Ziel** (Observer for the Netherlands), referring to paragraph 28 concerning draft article 78, said that the first sentence should be corrected to read: "By way of further explanation, it was observed that paragraph 1 of draft article 78 was intended to apply to charterparties and that paragraph 2 of the provision was intended to include bills of lading into which the terms of a charterparty had been incorporated by reference."

26. *It was so decided.*

27. **Mr. van der Ziel** (Observer for the Netherlands), turning to paragraph 29 also concerning draft article 78, said that, possibly because of the misunderstanding reflected in paragraph 28, there was now an error in the version of paragraph 2 of draft article 78 contained in paragraph 29 that needed to be corrected. He suggested replacing the words "such an arbitration agreement" with "such a transport document or electronic record". It was the document or record, rather than the agreement, that must comply with the requirements outlined in the subsequent subparagraphs. It was not a substantive change, but would clarify the revised document.

28. **Ms. Czerwenka** (Germany) said that it was her recollection that the chapeau was to stand as drafted. Only those subparagraphs requiring corrections had been amended.

29. **Mr. Miller** (United States of America) said that he was not against the proposal made by the representative of the Netherlands, but suggested using the term "electronic transport record" rather than "electronic record" for consistency with the language used throughout the draft convention.

30. **Mr. Sato** (Japan), supported by **Mr. Miller** (United States of America) and **Mr. Mollmann** (Observer for Denmark), said that, in his recollection, during the debate, the Secretary had read out subparagraphs (a), (b) and (c) of paragraph 2 of draft article 78, but had not read out the chapeau of paragraph 2. Since the Commission had approved the changes in subparagraphs (a) and (b), the chapeau should be changed accordingly; the proposed change to the chapeau was consistent with the Commission's debate on the draft article.

31. *It was so decided.*

32. *The section of the draft report on consideration of draft articles, chapter 12 (continued) and chapters 13 to 15 of the draft convention and related definitions (A/CN.9/XLI/CRP.1/Add.11), as amended, was adopted.*

Consideration of draft articles, chapters 16 and 17 of the draft convention (A/CN.9/XLI/CRP.1/Add.12)

33. **Ms. Czerwenka** (Germany), referring to paragraph 11 of A/CN.9/XLI/CRP.1/Add.12 concerning draft article 84, said that, in order to make the reference clear, the following sentence should be inserted at the beginning of the paragraph: "It was suggested to delete the words 'in force at the time this Convention enters into force'."

34. *It was so decided.*

35. **Ms. Lannan** (International Trade Law Division) said that a new paragraph should be inserted after paragraph 14 of document A/CN.9/XLI/CRP.1/Add.12, reading: "Following informal consultations, it was proposed that the following phrase be inserted into the chapeau of the draft provision, after the phrase 'enters into force': 'including any future amendment thereto'. Subject to the inclusion of a phrase along those lines, the Commission approved the draft article and referred it to the Drafting Group."

36. *It was so decided.*

37. *The section of the draft report on consideration of draft articles, chapters 16 and 17 of the draft convention (A/CN.9/XLI/CRP.1/Add.12), as amended, was adopted.*

Consideration of draft articles, chapter 17 (continued) and chapter 18 of the draft convention (A/CN.9/XLI/CRP.1/Add.13)

38. **Mr. van der Ziel** (Observer for the Netherlands), referring to paragraph 5 of A/CN.9/XLI/CRP.1/Add.13 concerning draft article 90, proposed replacing the first sentence by the following: "The proposal was accepted by acclamation by the Commission."

39. *It was so decided.*

40. **Ms. Czerwenka** (Germany), referring to paragraph 9 concerning draft article 92, said that, in order to reflect her delegation's comments more accurately, the last sentence should read: "Further, it was said that the definition of volume contract did not address the situation where the contract provided for a series of shipments by road but one single shipment by sea."

41. *It was so decided.*

42. *The section of the draft report on consideration of draft articles, chapter 17 (continued) and chapter 18 of the draft convention (A/CN.9/XLI/CRP.1/Add.13), as amended, was adopted.*

Consideration of draft articles, chapter 18 (continued) of the draft convention (A/CN.9/XLI/CRP.1/Add.14)

43. **Ms. Sabo** (Canada), referring to paragraph 3 of A/CN.9/XLI/CRP.1/Add.14 concerning draft article 94, proposed inserting the word "multi-unit" before "States" and deleting the words "between federal and provincial government", in line with the Commission's usual practice of not identifying individual States and so as to better reflect what was actually said.

44. *It was so decided.*

45. *The section of the draft report on consideration of draft articles, chapter 18 (continued) of the draft convention (A/CN.9/XLI/CRP.1/Add.14), as amended, was adopted.*

Consideration of draft articles, chapter 9 (continued) of the draft convention (A/CN.9/XLI/CRP.1/Add.15)

46. **Ms. Downing** (Australia), referring to paragraph 4 of A/CN.9/XLI/CRP.1/Add.15 concerning draft article 49, proposed inserting the following sentence at the end of the paragraph: "There was some support for the view that the new text of article 49 did not solve the problems previously identified."

47. *It was so decided.*

48. **Mr. Mollmann** (Observer for Denmark), referring to paragraph 7 concerning draft article 49, proposed inserting the following sentence after the second sentence in order to reflect the comments made by the Australian and Danish delegations: "Further, concern was expressed that in some jurisdictions a transport document containing a statement that the goods may be delivered without surrender of the transport document would not be considered a negotiable document at all."

49. *It was so decided.*

50. **Mr. Mollmann** (Observer for Denmark), referring to paragraph 9 concerning draft article 49, proposed inserting the phrase "into the transport document" after the word "incorporated" in the second sentence; otherwise it did not make sense.

51. *It was so decided.*

52. **Mr. van der Ziel** (Observer for the Netherlands), referring to paragraph 15 of A/CN.9/XLI/CRP.1/Add.15 concerning the debate on consequential changes to draft articles 47 and 48 to align them with the new text of draft article 49, said that there was another consequential change that should have been made to harmonize those three draft articles. In the new version of draft article 48, subparagraph (b) (iii) read: "the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the

document". Draft articles 47 and 49 dealt with analogous although, of course, not identical situations and should probably contain a similar clause. He realized that the question did not, properly speaking, have to do with the adoption of the draft report; rather, it was a suggestion for the drafting group that perhaps it could consider the appropriateness of including such a change in the version the Commission would have before it when it considered the final adoption of the draft convention.

53. **Ms. Czerwenka** (Germany) said that the point had in fact been raised when the consequential changes were discussed but no decision had been taken.

54. **Mr. Sato** (Japan) apologized for missing that point when he had proposed the consequential changes required to draft articles 47 and 48 and said that he would be happy to see the correction made but was not sure of the proper procedure.

55. **Mr. Estrella Faria** (International Trade Law Division) said that the changes involved were too substantive for the drafting group to consider; the Secretariat did not feel that it had the mandate to amend the text to that extent on its own initiative. Perhaps after concluding its consideration of the draft report, the Commission could revert to the question of finalization and approval of the draft convention.

56. **Ms. Carlson** (United States of America) said that her delegation supported that suggestion.

57. **Ms. Sabo** (Canada) proposed that the debate that would follow should be reflected in the draft report.

58. **The Chairperson** said that, hearing no objection, he took it that the Commission, after completing the agenda item currently under discussion, wished to revert to consideration of draft articles 47 and 49 and to have the debate reflected in the draft report.

59. *It was so decided.*

60. *The section of the draft report on consideration of draft articles, chapter 9 (continued) of the draft convention (A/CN.9/XLI/CRP.1/Add.15), as amended, was adopted.*

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (A/CN.9/645 and A/CN.9/XLI/CRP.1/Add.15)

Draft articles 47 and 49 (continued)

61. **Mr. van der Ziel** (Observer for the Netherlands) said that his delegation's proposal was that subparagraph (b) (iii) in draft article 48, as it appeared in A/CN.9/XLI/CRP.1/Add.15, paragraph 15, namely, "(iii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document", should be inserted into draft article 47 following subparagraph (c) (ii), and into draft article 49, paragraph 2, following subparagraph (b) (ii), with any appropriate adjustments in wording.

62. **Mr. Miller** (United States of America) said that his delegation could support the substance of the proposal of the Netherlands, since it was essentially a technical correction.

63. **Ms. Czerwenka** (Germany) pointed out that draft articles 47 and 49 applied to different situations and would require different wording. Draft article 47 referred to situations in which no negotiable transport document was issued.

64. **Mr. Mollmann** (Observer for Denmark) pointed out that draft article 47, subparagraph (a), second sentence, stated: "The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier." Therefore, only the first part of draft article 48, subparagraph (b) (iii), was pertinent in draft article 47. His specific proposal was that in draft article 47, subparagraph (c), first sentence, the word "or" should be deleted before "(ii)" and the words "or (iii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee," should be inserted before the words "the carrier may so advise the controlling party".

65. In draft article 49, on the other hand, paragraph 1 (a) (i) referred to the surrender of the negotiable transport document and stated that the holder would have to identify itself under certain circumstances, while paragraph 1 (a) (ii) talked about the holder demonstrating that it was the holder of the negotiable electronic transport record. Therefore, the whole text of draft article 48, subparagraph (b) (iii), could appropriately be inserted into draft article 49, paragraph 2 (a), provided the word "consignee" was replaced by the word "holder".

66. **Mr. Sato** (Japan) said he would like to offer a further refinement: the clause to be inserted in draft article 49, paragraph 2 (a), first sentence, before the words "the carrier may so advise the shipper", should read: "or (iii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, paragraph 10 (a) (i)".

67. **Mr. Mayer** (Switzerland) questioned whether it was correct not to mention surrender of the document in draft article 49.

68. **Mr. van der Ziel** (Observer for the Netherlands) said that Japan's proposal was correct, since paragraph 2 of draft article 49 applied to transport documents that stated that the goods could be delivered without the surrender of the document.

69. **Ms. Czerwenka** (Germany) said that her delegation could accept the proposal with respect to draft article 47. With respect to draft article 49, as she understood it, an attempt should first be made to deliver the goods in accordance with the provisions of paragraph 1; only if that were impossible could delivery be made without surrender of the document pursuant to paragraph 2.

70. **Mr. Sato** (Japan) said that in the situation covered by his proposal, it was possible that the holder might present a transport document but not surrender it.

71. **Mr. Schelin** (Observer for Sweden) asked if his understanding was correct that the phrase "the person claiming to be the consignee" would not be included, since paragraph 2 only came into play when the transport document did not need to be surrendered.

72. **The Chairperson** confirmed his interpretation.

73. **Mr. Sharma** (India) said that his delegation was fully in agreement with the composite proposals by the delegations of the Netherlands, Denmark and Japan and was satisfied that the inconsistency had been resolved.

74. *Draft articles 47 and 49, as amended, were approved in substance and referred to the drafting group.*

75. **Ms. Carlson** (United States of America) said that she spoke for all the delegations in expressing gratitude to the Chairperson for his outstanding leadership in bringing the agenda item to a successful conclusion and to the members of the Secretariat for their hard work and insightful suggestions. On returning to the capital her delegation would immediately set to work on the steps that would be required to prepare for implementation.

The meeting rose at 5.55 p.m.